

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2011

Judicial Retirement and Return to Practice

Mary Clark

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), and the [Judges Commons](#)

JUDICIAL RETIREMENT AND RETURN TO PRACTICE

Mary L. Clark⁺

I. RECENT SCHOLARLY DEBATE OVER INTRODUCING FIXED TERMS OF SERVICE OR MANDATORY RETIREMENT FOR U.S. SUPREME COURT JUSTICES	844
A. <i>Fixed Terms</i>	844
1. <i>Concern for Democratic-Accountability Effects of Lengthened Supreme Court Tenure</i>	847
2. <i>Politicization of Judicial Confirmation Process</i>	851
3. <i>Mental Decrepitude</i>	852
B. <i>Mandatory Retirement</i>	855
C. <i>Return to Practice</i>	858
II. JUDICIAL RETIREMENT AND RETURN-TO-PRACTICE RULES AND CONVENTIONS FOR ARTICLE III AND ENGLISH AND WELSH HIGHER JUDICIARIES	859
A. <i>Life Tenure for Article III Judges</i>	859
B. <i>Return to Practice by Former Article III Judges</i>	864
C. <i>Life Tenure with Mandatory Retirement for Higher Court Judges in England and Wales</i>	870
D. <i>Convention Against Return to Practice for Higher Court Judges in England and Wales</i>	876
E. <i>Comparative Conclusions</i>	884
III. THE UNITED STATES SHOULD RETAIN LIFE TENURE WITHOUT MANDATORY RETIREMENT OR FIXED-SERVICE TERMS AND PROHIBIT ARTICLE III JUDGES FROM RETURNING TO PRACTICE	887
A. <i>Retaining Life Tenure Without Mandatory Retirement or Fixed Terms of Service for Article III Judges</i>	887
B. <i>Adopting a Prohibition on Article III Judges' Return to Practice</i>	895
IV. CONCLUSION	904
APPENDIX A	906
APPENDIX B	910
TABLE 1	911
TABLE 2	913

This Article engages recent scholarly debates about U.S. Supreme Court tenure and retirement practices, specifically those concerning the merits of adopting eighteen-year term limits or mandatory retirement for Supreme Court

⁺ Associate Professor, Washington College of Law, American University.

Justices. It broadens the discussion by including all Article III judges and by addressing former Article III judges' return to practice following resignation or retirement, which has been largely ignored in the literature to date despite what I have found to be the return-to-practice rate of over forty percent in the last two decades.¹

To place the U.S. debate in context and better understand the range of possible approaches to judicial retirement and return-to-practice questions, this Article compares Article III rules and practices with those for the higher judiciary in England and Wales,² revealing their polar-opposite approaches to these issues, as Diagram 1 reflects.

DIAGRAM 1

	LIFE TENURE	LIFE TENURE WITH MANDATORY RETIREMENT
NO PROHIBITION ON FORMER JUDGES' RETURN TO PRACTICE	U.S. Article III judiciary	
PROHIBITION OR CONVENTION AGAINST JUDGES' RETURN TO PRACTICE		English and Welsh higher judiciary

1. See *infra* app. B at 70.

2. The higher judiciary in England and Wales includes the High Court, the Court of Appeal, and the new U.K. Supreme Court, which replaced the Appellate Committee of the House of Lords in 2009. *Appellate Committee of the House of Lords*, SUP. CT., <http://www.supremecourt.gov.uk/about/appellate-committee.html> (last visited Sept. 11, 2011); *Going to Court*, JUDICIARY ENG. & WALES, <http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/going-to-court.htm> (last visited Sept. 11, 2011). As of 2010, there were 161 higher court judgeships in England and Wales. *Judicial Expenses*, JUDICIARY ENG. & WALES, <http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/terms-of-service/judicial-expenses.htm> (last visited Sept. 11, 2011).

This Article focuses on the judiciary of England and Wales, not the judiciaries of Northern Ireland or Scotland, because each jurisdiction in the United Kingdom has its own judicial-conduct code and legal, professional culture, and this Article focuses on the largest and most prominent jurisdiction, England and Wales. See *The Justice System and the Constitution*, JUDICIARY ENG. & WALES, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-access-and-justice-sys-and-constitution> (last visited Sept. 11, 2011).

Diagram 2 fills in the remaining cells, first with Alternative One, which reflects recent proposals to introduce fixed-service terms or mandatory retirement for U.S. Supreme Court Justices. These proposals do not address former Article III judges' return to practice and do not suggest altering current rules, which do not prohibit return, as Diagram 2 reflects. Alternative Two, recommended by this Article, retains life tenure without fixed terms of service or mandatory retirement for all Article III judges and introduces a prohibition on former Article III judges' return to practice.

DIAGRAM 2

	LIFE TENURE	LIFE TENURE WITH MANDATORY RETIREMENT
NO PROHIBITION ON FORMER JUDGES' RETURN TO PRACTICE	U.S. Article III judiciary	Alternative One [reflected in recent proposals for fixed-service terms or mandatory retirement for U.S. Supreme Court Justices]
PROHIBITION OR CONVENTION AGAINST JUDGES' RETURN TO PRACTICE	Alternative Two [reflected in this Article's reform recommendations]	English and Welsh higher judiciary

This Article advocates retaining life tenure because it promotes institutional and individual judicial independence better than either fixed terms of service or mandatory retirement. Life tenure promotes institutional independence by safeguarding the judiciary's ability to exercise autonomy and power with respect to the other branches, and it promotes individual independence by furthering individual judges' abilities to decide cases free of fear or favor.³ In both respects, life tenure promotes judicial independence better than either fixed terms or mandatory retirement.⁴ Life tenure should also be retained because the proposed alternatives do not satisfactorily redress the asserted

3. See *infra* notes 320–21 and accompanying text.

4. See *infra* Part I.

concerns about life tenure, but instead risk potentially significant negative consequences to judicial impartiality and integrity as well as independence.⁵

This Article also recommends prohibiting former Article III judges from returning to law practice and legal consulting because both raise concerns for negative effects on judicial independence, impartiality, and integrity.⁶ This recommendation is also informed by concern that actual or apparent self-dealing by judges considering post-bench employment threatens the public's trust and confidence in the courts.⁷

The Article begins by highlighting the recent scholarly debates over fixed terms of service and mandatory retirement for U.S. Supreme Court Justices. Part I also notes the dearth of scholarship on former Article III judges' return to practice and encourages further debate on this point. In Part II, the Article compares and contrasts judicial retirement and return-to-practice rules and conventions for the Article III and English and Welsh higher judiciaries.

The Article concludes by recommending against fixed terms and mandatory retirement for Article III judges, instead advocating reforms to encourage more, earlier voluntary retirement and the introduction of formal self-monitoring of misconduct and disability by Supreme Court Justices, as is currently done by lower federal courts pursuant to the Judicial Conduct and Disability Act of 1980.⁸ Lastly, this Article recommends prohibiting former Article III judges from returning to law practice and legal consulting, given the potential for actual and apparent conflicts of interest.

I. RECENT SCHOLARLY DEBATE OVER INTRODUCING FIXED TERMS OF SERVICE OR MANDATORY RETIREMENT FOR U.S. SUPREME COURT JUSTICES

A. *Fixed Terms*

Much has been written lately about the need to abolish life tenure for Supreme Court Justices. A number of scholars have advocated non-renewable fixed terms of service to replace life tenure.⁹ This Article focuses on two of

5. See Ward Farnsworth, *Resolved, The Terms of the Supreme Court Justices Should Be Limited to Eighteen Years: Con*, in *DEBATING REFORM: CONFLICTING PERSPECTIVES ON HOW TO FIX THE AMERICAN POLITICAL SYSTEM* 245, 250 (Richard J. Ellis & Michael Nelson eds., 2011) ("There is much to be said for leaving the Constitution alone unless it is clear that revising it would create net benefits. . . . Those who wish to end life tenure for Supreme Court justices have a high standard of proof to satisfy, and Calabresi and Lindgren have come up short."); *infra* notes 97, 119–21 and accompanying text.

6. See *infra* note 321 and accompanying text.

7. See *infra* notes 396–409 and accompanying text.

8. Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 351–364 (2006)).

9. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 15 (Roger C. Cramton & Paul D. Carrington eds., 2006) [hereinafter Calabresi & Lindgren, original version of *Term Limits for the Supreme Court*]; Steven G. Calabresi & James

the fixed-term proposals that have garnered the most attention, those of (1) Professors Steven Calabresi and James Lindgren¹⁰ and (2) Professors Paul

Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006) [hereinafter Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*] (providing an extended version of the original article to include additional relevant data and to offer responses to earlier scholarly criticism and comments); Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra*, at 467 [hereinafter Carrington & Cramton, print version of *The Supreme Court Renewal Act*]; Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, PAUL DEWITT CARRINGTON (July 5, 2005), www.paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm [hereinafter Carrington & Cramton, online version of *The Supreme Court Renewal Act*]; Paul D. Carrington & Roger C. Cramton et al., *Four Proposals for a Judiciary Act of 2009, Proposal I: Regular Appointments to the Supreme Court*, PAUL DEWITT CARRINGTON (Feb. 9, 2009), <http://paulcarrington.com/Four%20Proposals%20For%20A%20Judiciary%20Act.htm> (proposing biennial appointment of Supreme Court Justices and rotation of duties after eighteen years of service).

Prior to these proposals, Professors Philip Oliver and Lucas Powe, Jr. had also advocated non-renewable, eighteen-year fixed terms of service on the Supreme Court; Oliver principally advocated regularity of turnover on the Court, allowing every presidential administration two nominations and avoiding strategic retirement. Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800, 811–12 (1986); see L. A. Powe, Jr., *Go Geezers Go: Leaving the Bench*, 25 LAW & SOC. INQUIRY 1227, 1235 (2000); L. A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMMENT. 195, 196–97 (1995) (“Life tenure is the Framers’ greatest lasting mistake.”); see also L. A. Powe, Jr., *Marble Palace, We’ve Got a Problem—With You*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra*, at 99, 107.

Professor Sanford Levinson also has written in support of tenure limitations on the Supreme Court. See Sanford Levinson, *Contempt of Court: The Most Important ‘Contemporary Challenge’ to Judging*, 49 WASH. & LEE L. REV. 339, 341–42 (1992); Sanford Levinson, *Life Tenure and the Supreme Court: What Is To Be Done?*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra*, at 375, 376.

One scholar, Professor Judith Resnik, has suggested that Article III could be reinterpreted to permit fixed terms rather than life tenure, obviating the need for a constitutional amendment or statute. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 584 (2005) (applying the fixed-term concept to the lower Article III judiciary as well as the Supreme Court and suggesting that Article III could be reinterpreted to permit fixed terms, thus obviating the need for a constitutional amendment or statute); see also Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 997, 1000–06 (2007) (highlighting and synthesizing this debate).

Finally, Professor Michael Mazza has examined the desirability of fixed terms of service at the court of appeals level and charted the history of term-limit proposals in the late nineteenth and twentieth centuries. Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 133, 143–47, 155–62 (2003); see *infra* text accompanying notes 149–52.

10. See Calabresi & Lindgren, original version of *Term Limits for the Supreme Court*, *supra* note 9; Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9.

Carrington and Roger Cramton.¹¹ Calabresi and Lindgren propose a constitutional amendment imposing non-renewable, eighteen-year terms for Supreme Court Justices,¹² and Carrington and Cramton propose adopting a similar scheme by means of the “Supreme Court Renewal Act.”¹³ Both Calabresi and Lindgren’s and Carrington and Cramton’s proposals anticipate that Justices will retire to senior status at the expiration of their eighteen-year terms and then serve on the lower federal courts or in place of recused Justices.¹⁴ Notably, Calabresi and Lindgren consider Carrington and Cramton’s proposed statute to be unconstitutional,¹⁵ a position with which many commentators agree.¹⁶ Neither proposal addresses the tenure of Article III judges below the Supreme Court level. Calabresi and Lindgren instead acknowledge that “any attempt to institute term limits for lower federal court judges would present enormous administrative problems that might outweigh any benefits of limiting tenures for those judges.”¹⁷

Calabresi and Lindgren’s and Carrington and Cramton’s proposals to limit Supreme Court service to non-renewable, eighteen-year terms were motivated in substantial part by concerns for potential negative effects associated with

11. See Carrington & Cramton, print version of *The Supreme Court Renewal Act*, *supra* note 9; Carrington & Cramton, online version of *The Supreme Court Renewal Act*, *supra* note 9.

12. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 770–72 (emphasizing a pronounced growth in the length of Supreme Court tenure in the second half of the twentieth century and proposing eighteen-year term limits for Supreme Court Justices). *But see* David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi and Lindgren*, 30 HARV. J.L. PUB. POL’Y 791 *passim* (2007) (critiquing the data and analysis relied on by Calabresi and Lindgren).

In opposing life tenure for Supreme Court Justices, Calabresi and Lindgren draw on commentators such as Robert Yates, who—writing as “Brutus”—opposed life tenure on democratic-accountability grounds. See Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 773 (citing ROBERT YATES, BRUTUS NO. XV (Mar. 20, 1788), *reprinted in* THE ANTI-FEDERALISTS 350, 350–52 (Cecilia M. Kenyon ed., 1966)). Calabresi and Lindgren also cite Thomas Jefferson, who advocated short, renewable terms and, more contemporarily, Oliver and Powe. See *id.* at 773–74.

Calabresi and Lindgren claim that “only one figure, Professor Ward Farnsworth of Boston University, has defended life tenure as it currently operates.” *Id.* at 774 (citing Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 408).

13. Carrington & Cramton, print version of *The Supreme Court Renewal Act*, *supra* note 9, at 467–71 (proposing adoption of Supreme Court term limits by statutory change).

14. See Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 856–58; Carrington & Cramton, online version of *The Supreme Court Renewal Act*, *supra* note 9.

15. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 776; *accord* David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute”*, 83 WASH. U. L.Q. 1397, 1418–19 (2005).

16. See, e.g., Ward Farnsworth, *The Case for Life Tenure*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 9, at 251, 265–66; Stras & Scott, *supra* note 12, at 793.

17. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 772 n.10.

lengthened Supreme Court tenure, which they charted as growing from an average of 14.9 years for Justices retiring between 1789 and 1970, to 26.1 years for Justices retiring between 1971 and 2005.¹⁸ According to all four authors, three main problems arise from lengthened tenure: (1) a pronounced lack of democratic accountability on the part of the Court and its members; (2) a highly politicized Supreme Court confirmation process, given its unpredictable and infrequent occurrence; and (3) an increased potential for mental “decrepitude” among long-serving Justices.¹⁹ Closely related to the first concern, Carrington and Cramton assert that life tenure has led to excessive arrogance, hubris, and abuse of office by Supreme Court Justices.²⁰ Calabresi and Lindgren and Carrington and Cramton argue that replacing life tenure with non-renewable, fixed terms for Supreme Court Justices would redress all of these concerns.²¹

1. Concern for Democratic-Accountability Effects of Lengthened Supreme Court Tenure

With regard to their first point, all four scholars assert that regular, predictable resignations from and appointments to the Court would promote the democratic accountability of the Court and its members more effectively than life tenure, particularly given the recent lengthening of Justices’ tenures.²² According to these authors, judicial confirmation hearings constitute the only real moment of accountability for the Court because no Justice has ever been removed from office by means of impeachment, the other principal mechanism of democratic accountability.²³ Thus, the increasing length of Supreme Court service results in fewer hearings and less accountability.

As Professors David Stras and Ryan Scott make clear, however, Calabresi and Lindgren’s choice of time periods of study of Supreme Court tenure exaggerates the lengthened service effect upon which their democratic

18. *Id.* at 770–71, 778–79.

19. *Id.* at 809–18.

20. Carrington & Cramton, print version of *The Supreme Court Renewal Act*, *supra* note 9, at 468 (discussing the founders’ fears of unchecked power). *But see* Farnsworth, *supra* note 16, at 261 (“[M]ost of the hubris in Supreme Court opinions probably is attributable mostly to sources other than life tenure.”).

21. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 772; Carrington & Cramton, online version of *The Supreme Court Renewal Act*, *supra* note 9.

22. *See* Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 810–11; Carrington & Cramton, print version of *The Supreme Court Renewal Act*, *supra* note 9, at 468.

23. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 810–12; Carrington & Cramton, print version of *The Supreme Court Renewal Act*, *supra* note 9, at 468; *see also* Daniel J. Meador, *Thinking About Age and Supreme Court Tenure*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES*, *supra* note 9, at 115, 115.

accountability argument is premised.²⁴ Calabresi and Lindgren's contemporary period of study—with Justices retiring between 1971 and 2005—is an outlier in the history of Supreme Court tenure because four Justices who retired during this period served longer than almost any other Justice: Hugo Black (34.1 years), William Brennan (33.8 years), William O. Douglas (36.6 years), and William Rehnquist (33.7 years). Although Calabresi and Lindgren recognize that these Justices are some of the longest-serving in U.S. history, they fail to acknowledge that their choice of 1971 as the beginning of their contemporary period resulted in their capturing two of the longest-serving Justices, Black and Douglas, who retired in 1971 and 1975, respectively.²⁵ Had Calabresi and Lindgren not included these Justices in their modern period, their lengthened-tenure effect would have been decidedly less dramatic,²⁶ instead reflecting Stras and Scott's finding that Supreme Court tenure has grown slowly and steadily over time.²⁷ Indeed, Professor Kevin McGuire has found that “the tenure of the justices has been quite stable over time.”²⁸

In responding to Calabresi and Lindgren's and Carrington and Cramton's first concern for lengthened tenure's weakening of democratic accountability, Professor Stephen Burbank underscores the cramped understanding of accountability in which these authors' life tenure critiques are grounded.²⁹ As Burbank states, their proposals mistakenly conceive of accountability as “dichotomous” from judicial independence, rather than viewing the two as being in an inherently dynamic relationship.³⁰

24. Stras & Scott, *supra* note 12, at 794–95, 799–807; Stras & Scott, *supra* note 15, at 1427, 1428 chart 1.

25. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 779.

26. See Stras & Scott, *supra* note 12, at 799–807. Moving the start date in Calabresi and Lindgren's study from 1970 to either 1975 or 1965 would reduce the average tenure length for that period from 26.1 years to 25.1 or 22.1 years, respectively. *Id.* at 804 n.58.

U.C.-Irvine political scientists Bernard Grofman and Reuben Kline have also challenged Calabresi and Lindgren's and Carrington and Cramton's findings of lengthened tenure based on their choice of study periods, concluding that the current average length of service is not that different from early nineteenth-century service terms “even if there is some evidence of a slight increase in length of service in very recent decades.” Bernard Grofman & Reuben Kline, *A New Measure for Understanding the Tenure of U.S. Supreme Court Justices*, 93 JUDICATURE 247, 249–50 (2010).

27. Stras & Scott, *supra* note 15, at 1427–30.

28. Kevin T. McGuire, *An Assessment of Tenure on the U.S. Supreme Court*, 89 JUDICATURE 8, 10, 12 (2005), *quoted in* Stephen B. Burbank, *An Interdisciplinary Perspective on the Tenure of Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 9, at 317, 321.

29. See Burbank, *supra* note 28, at 319, 326–27.

30. *Id.* at 319; see also Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1523–24 (2006) [hereinafter Burbank, *Alternative Career Resolution II*]; Stephen B. Burbank et al., *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY

Moreover, Calabresi and Lindgren's and Carrington and Cramton's proposals may undermine, rather than promote, accountability, as reliance on non-renewable terms creates incentives for Justices to use their positions to maximize, or at the very least preserve, their prospects for post-bench employment by actually or apparently issuing judgments favorable to potential employers.³¹ Professor Ward Farnsworth, like Stras and Scott, highlighted this danger of actual or potential self-dealing by term-limited judges:

[A]ny regime other than life tenure will push some Justices out of office while they are still lucid and thus create a risk that they will use their time at the Court to angle for attractive situations afterwards. It need not be a question of bad faith; the greater hazard is a subtle bias reminding its holder that letting down one's friends now can have disappointing professional consequences later.³²

According to Farnsworth, judicial self-dealing to preserve future employment prospects is of greatest concern in the case of fixed-term service—though also present in mandatory-retirement schemes—because “the result often may be to produce ex-Justices still in the prime of their careers.”³³

Calabresi and Lindgren's partial response to this self-dealing concern is that under a term-limit scheme, presidents will not have an incentive to appoint young Justices, as they do under life tenure;³⁴ thus concern for judicial self-dealing may be allayed because older Justices would presumably be less interested in returning to practice following the completion of their Supreme Court service. Beyond that, under Calabresi and Lindgren's and Carrington and Cramton's term-limit proposals, “expired” Justices may continue to hear cases in lower federal courts or may substitute for recused justices,³⁵ which would presumably limit interest in return to non-judicial employment. Calabresi and Lindgren do not offer empirical support, however, for the propositions that judicial appointees will be older under a term-limit scheme or

APPROACH 9, 9–11 (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter Burbank et al., *Reconsidering Judicial Independence*] (identifying the “erroneous premise” that underlies discussions of judicial independence, which considers “judicial independence and judicial accountability [as] discrete concepts at war with each other, when in fact they are complementary concepts that can and should be regarded as allies”).

31. Stras & Scott, *supra* note 15, at 1424–25 (“Life tenure promotes independence in several ways. . . . [I]t means that federal judges ‘have reached the end of their official careers,’ rendering them unconcerned about angling for future political appointment Even fixed, nonrenewable terms . . . would introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary.” (footnotes omitted)).

32. Farnsworth, *supra* note 12, at 446.

33. *Id.*; Farnsworth, *supra* note 16, at 264 (“A justice at the end of an eighteen-year term may still be in his sixties and thus have significant professional prospects . . .”).

34. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 837–38.

35. *Id.* at 856–58; Carrington & Cramton, online version of *The Supreme Court Renewal Act*, *supra* note 9.

that former Justices would opt to serve as lower federal court judges rather than return to practice.³⁶ Indeed, Calabresi and Lindgren acknowledge that their “proposal may have no impact on the current trend of appointing individuals in their fifties.”³⁷

Farnsworth, for one, is skeptical that former Supreme Court Justices would choose service as district or appellate court judges over “more intriguing opportunities elsewhere,” including the “remunerative lure of” private practice or the prestige of high-level government appointment, “the prospects for which would depend on the justice’s ability to stay well-liked by the party in power,”³⁸ thereby highlighting the self-dealing concern.

Farnsworth’s primary critique of Calabresi and Lindgren’s and Carrington and Cramton’s democratic-accountability rationale is that long Supreme Court tenures—facilitated by life tenure—slow the development of the law, whereas shorter tenures—comparable to fixed-service proposals—lead to faster changes in decisional law, rendering it more responsive to public opinion,³⁹ which is more akin to Congress’s function than to the function historically associated with the Court.⁴⁰ According to Farnsworth, “when advocates of term limits claim the Court has become too distant from the public, they are taking a position on how much to trust conclusions majorities reach over shorter and longer periods of time,” favoring the shorter.⁴¹

Despite his advocacy for mandatory retirement, Professor David Garrow rejects Calabresi and Lindgren’s and Carrington and Cramton’s term-limit proposals as ideologically and politically motivated attempts to constrain the Court’s power and bring it into closer conformity with public opinion.⁴² According to Garrow, it is “all too undeniably clear that the present initiative for Supreme Court term-limits is in its essence an ideologically-motivated ‘Trojan Horse’ masquerading as a non-partisan modernization reform.”⁴³ Garrow emphasizes Calabresi and Lindgren’s assertion that “‘enhancing popular control over the Court’s constitutional interpretations will actually lead to better decisions than are produced by the current system.’”⁴⁴ Calabresi and Lindgren expand on this point by asserting that “the general public is more likely than are nine life-tenured lawyers to interpret the Constitution in a way

36. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 837.

37. *Id.*

38. Farnsworth, *supra* note 16, at 263.

39. *Id.* at 251–53.

40. *Id.*

41. *Id.* at 253.

42. David J. Garrow, *Protecting and Enhancing the U.S. Supreme Court*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 9, at 271, 278–80.

43. *Id.* at 280.

44. *Id.* at 280 & n.58 (quoting Calabresi & Lindgren, original version of *Term Limits for the Supreme Court*, *supra* note 9, at 59).

that is faithful to its text and history, which is how constitutional decision making ought to proceed.”⁴⁵ This understanding of the optimal approach to constitutional interpretation is at the heart of Calabresi and Lindgren’s and Carrington and Cramton’s democratic-accountability critique of life tenure.⁴⁶

2. Politicization of Judicial Confirmation Process

Calabresi and Lindgren’s and Carrington and Cramton’s second rationale for adopting non-renewable, eighteen-year terms is that Supreme Court confirmation hearings would become less politicized than at present because they would occur regularly and predictably every two years, with two appointments per presidential administration.⁴⁷ There is no reason to think, however, that Supreme Court confirmation hearings will become any less contentious simply because they occur more often; rather, the opposite may well be true.⁴⁸ As Burbank and Farnsworth suggest, confirmation hearings could become more embittered if more frequent because they could become the target of regular campaigning by liberal and conservative interest groups, among others.⁴⁹ Garrow suggests that Supreme Court appointments could come to be regarded as the “political spoils” of presidential elections under term-limit proposals, thereby exacerbating, rather than lessening, the politicization of both the Court and the confirmation process.⁵⁰

Furthermore, Calabresi and Lindgren and Carrington and Cramton argue that life tenure politicizes the appointment process because it leads to strategic retirement—that is, to a Justice timing his or her retirement to increase the likelihood that a president of his or her favored political party will have the

45. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 833.

46. See, e.g., *id.* at 809–13; Carrington & Cramton, online version of *The Supreme Court Renewal Act*, *supra* note 9.

47. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 813, 832–33; see Carrington & Cramton, print version of *The Supreme Court Renewal Act*, *supra* note 9, at 469, 471.

48. See, e.g., Burbank, *Alternative Career Resolution II*, *supra* note 30, at 1545–47; Farnsworth, *supra* note 12, at 433 (“Meanwhile there is reason to worry that fixed terms would make the unappealing features of the confirmation process worse. By attaching nominating chances to presidencies they would create more natural cycles of revenge . . .”); see also Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES*, *supra* note 9, at 291, 298 (utilizing fixed terms for Justices “would significantly increase the politicization” of the selection process beyond current levels).

49. See Burbank, *Alternative Career Resolution II*, *supra* note 30, at 1537–47; Farnsworth, *supra* note 12, at 434.

50. Garrow, *supra* note 42, at 281; see also Farnsworth, *supra* note 12, at 434 (“If Justices served terms of eighteen years, one no longer would speak of the possibility that the winner of a presidential election might make appointments to the Court. Every winner would be guaranteed two of them. The stakes for the Court in every campaign thus would be higher than they currently are.”).

opportunity to name a like-minded replacement.⁵¹ By contrast, recent studies have found “no consistent support for justices taking partisan factors into account, either in their retirement decisions or in their decisions to remain on the bench.”⁵² Indeed, one advocate of mandatory retirement concluded that the “single most important” influence on justices’ decisions to leave the bench is the availability of “a formal retirement provision with generous benefits.”⁵³ Although Calabresi and Lindgren and Carrington and Cramton limit their proposals to Supreme Court tenure, other commentators have questioned the strategic-retirement hypothesis as it applies to lower court judges, again identifying pension eligibility as the leading determinant of retirement decisions.⁵⁴

3. *Mental Decrepitude*

Calabresi and Lindgren’s and Carrington and Cramton’s third argument for term limits rests on concern for mental decrepitude occurring among Supreme

51. Paul D. Carrington & Roger C. Cramton, *Reforming the Supreme Court: An Introduction*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 9, at 3, 7 (asserting that all participants in the symposium on which the book was based agreed that “current [tenure] arrangements create incentives for strategic behavior by presidents, justices and senators that may not be in the interest of the Court or the public”); Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 801–02 (“Although this analysis does not prove that justices have engaged in strategic gaming—and indeed, more sophisticated time-series analyses would be advisable—the data are consistent with that conclusion, which is bolstered by the anecdotal evidence.”).

52. Christopher J. W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies, 1789–1992*, 22 POL. BEHAV. 145, 160 (2000), *quoted in* Burbank, *supra* note 28, at 323; accord Garrow, *supra* note 42, at 277 (referring to the work of Professor Saul Brenner as “persuasively demonstrat[ing that] sitting justices since 1937 have time and again delayed and postponed their retirements rather than step down at ideologically advantageous earlier opportunities” (citing Saul Brenner, *The Myth that Justices Strategically Retire*, 36 SOC. SCI. J. 431 (1999))).

53. ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 225 (2003).

54. Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002*, 8 AM. L. & ECON. REV. 143, 177 (2006); *see also* Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 9, at 181, 182 & n.1 (citing Yoon’s finding of pension eligibility as leading predictor of judicial retirement); Stras & Scott, *supra* note 15, at 1432–36 (citing political scientists’ skeptical empirical analyses of the strategic-retirement thesis). *But see* Stephen J. Choi et al., *The Law and Policy of Judicial Retirement* 22 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Research Paper No. 11-24; N.Y. Univ. Sch. of Law, Law & Econ. Research Paper Series, Research Paper No. 11-12; Univ. of Chi. Law Sch., Law & Econ., Olin Research Paper No. 549, 2011), *available at* <http://ssrn.com/abstract=1792422> (finding that “[w]ealthy [district court] judges are less sensitive to . . . [pension] incentives”).

Court Justices.⁵⁵ Calabresi and Lindgren argue that eighteen-year terms might likely expire before any Justice suffered “mental decrepitude,”⁵⁶ which they define by briefly referencing Garrow’s article concerning mental decrepitude on the Supreme Court.⁵⁷ Calabresi and Lindgren observe that “the advanced age of some Supreme Court Justices has at times led to a problem of ‘mental decrepitude’ on the Court, whereby some Justices have been physically or mentally unable to fulfill their duties during the final stages of their career.”⁵⁸ Carrington and Cramton frame the mental decrepitude question with greater nuance than do Calabresi and Lindgren.⁵⁹ Acknowledging that the 1980 Judicial Conduct and Disability Act works “reasonably well” to redress competence questions at the lower federal court level,⁶⁰ Carrington and Cramton observe that Supreme Court Justices are left largely to their own devices in regulating their work, with few choosing to take senior status or retire altogether when confronted with a disability, despite their eligibility to do so.⁶¹ According to Carrington and Cramton, Supreme Court Justices can and do take steps short of leaving the bench to make their workload more manageable when faced with physical or mental disability or diminished energy level; such steps include constricting the Court’s docket and delegating increased responsibility to law clerks.⁶² However, these mechanisms constitute inappropriate exercises of Supreme Court power, according to Carrington and Cramton.⁶³ They argue that the potential for Justices’ diminished abilities should instead be redressed by reliance on fixed terms of service.⁶⁴

55. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 815–18; Carrington & Cramton, online version of *The Supreme Court Renewal Act*, *supra* note 9.

56. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 839–40.

57. *Id.* at 771–72 (citing David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000)). Garrow does not provide a definition of “mental decrepitude” at the start of his study, but provides a number of definitions in the context of his account of Justices suffering from mental decrepitude, including: mentally incompetent, mentally unstable, suffering from mental incapacity, dependent on sleeping pills, suffering from the after-effects of strokes (major and minor), being mentally disabled, experiencing mental deterioration, having declining mental acuity, experiencing declining mental energy, suffering nervous breakdowns, experiencing mental confusion, and suffering from memory loss. Garrow, *supra*, *passim*.

58. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 771–72 (citing Garrow, *supra* note 57, at 995).

59. Carrington & Cramton, print version of *The Supreme Court Renewal Act*, *supra* note 9, at 469–70.

60. *Id.* at 469.

61. *Id.* at 470.

62. *See id.*

63. *See id.*

64. *See id.* at 471.

Calabresi and Lindgren's and Carrington and Cramton's proposals fail to redress the mental decrepitude concern satisfactorily, however, because debilitating disabilities can occur unpredictably, depending on an individual's life experiences (such as disease, accidents, or trauma) and age at the time of appointment.⁶⁵ Indeed, Calabresi and Lindgren acknowledge that their proposal is "not directly responsive to the problem of mental decrepitude on the Court," but assert that it "would significantly further the goal of preventing mentally or physically decrepit Justices from serving on the Court."⁶⁶ For support, Calabresi and Lindgren rely on Garrow's evidence that nine of the eighteen instances of mental decrepitude on the Court have arisen after eighteen years of service, and thus their proposal would have prevented fifty percent of those cases from occurring,⁶⁷ although Calabresi and Lindgren attribute to Garrow a different list of Supreme Court Justices suffering from mental decrepitude than Garrow himself presents.⁶⁸ Calabresi and Lindgren acknowledge that their proposal would have done nothing to prevent the

65. Farnsworth, *supra* note 12, at 447 ("[A] Justice appointed later in life to an eighteen-year term may well serve *past* age seventy-five, making limited terms . . . less reliable than age limits as measures to reduce the risk of decrepitude.").

66. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 838.

67. *Id.* at 838–39 & nn.233–34 (citing Garrow, *supra* note 57, at 1084–85).

68. Calabresi and Lindgren ascribe the following list of Justices suffering mental decrepitude to Garrow: (1) John Rutledge; (2) William Cushing; (3) Henry Baldwin; (4) Robert Grier; (5) Nathan Clifford; (6) Stephen Field; (7) Joseph McKenna; (8) William Howard Taft; (9) Oliver Wendell Holmes; (10) Frank Murphy; (11) Sherman Minton; (12) Charles Whittaker; (13) Hugo Black; (14) William O. Douglas; (15) William Rehnquist; (16) Lewis Powell; (17) William Brennan; and (18) Thurgood Marshall. *Id.* at 838 n.232 (citing Garrow, *supra* note 57). Calabresi and Lindgren rely on this list for their assertion that nine of these eighteen Justices would have been "term-limited" under their proposal before the Justices' mental decrepitude arose. *Id.* at 838–39. Garrow himself offers a different list of mentally decrepit Supreme Court Justices:

While the pre-twentieth-century Court featured at least four justices—Baldwin, Grier, Clifford, and Fried—and perhaps two more—Rutledge and Cushing—whose mental incapacity should have barred their continued service, the twentieth-century Court has featured *eleven* justices whose mental decrepitude or mentally infirm judgment should have led to their departure from the bench years or months before they did vacate their seats. . . . Chief Justices Fuller and Taft, and Justices McKenna and Holmes, all remained on the Court longer than their colleagues and relatives knew was in the public interest. . . . Murphy and Whittaker—suffered from conditions which should have precluded their ongoing service, and five others—Minton, Black, Douglas, Powell, and Marshall—all overstayed the length of service their mental energies were capable of rendering.

Garrow, *supra* note 57, at 1084–85. Thus, Garrow included Chief Justice Melvin Fuller, who Calabresi and Lindgren omitted, and did not include Rehnquist and Brennan, who Calabresi and Lindgren attributed to him.

remaining fifty percent of mental decrepitude cases from occurring because they arose before eighteen years of service had elapsed.⁶⁹

In addition to failing to address disabilities that could arise prior to a Justice's term expiring, Calabresi and Lindgren's proposed reform would force competent Justices to leave the bench long before they would otherwise choose to retire simply because their terms had expired, thereby depriving the legal system and the public of that Justice's knowledge and expertise.⁷⁰ Moreover, their proposal for "expired" Justices to serve on the lower federal courts (or as substitutes for recused Justices) ignores their concern for Justices developing mental decrepitude, as any such service would occur after the eighteen-year mark.⁷¹ As Farnsworth questions, is mental decrepitude any less important on the lower courts than on the Supreme Court?⁷² A more effective reform is for the Supreme Court to introduce a mechanism for monitoring and redressing relevant disabilities,⁷³ similar to the Judicial Conduct and Disability Act for the lower federal courts.⁷⁴

B. Mandatory Retirement

Apart from term limits, a handful of commentators have advocated mandatory retirement at age seventy-five instead of life tenure for Supreme Court Justices.⁷⁵ None of these commentators have addressed the merits of mandatory retirement below the Supreme Court level. In recommending an age limit of seventy-five for Supreme Court service, Garrow provides the most in-depth study of mental decrepitude occurring on the Court to date, charting a comprehensive history of mental disability among the Justices from the Court's establishment through the 1990s.⁷⁶ This Article rejects Garrow's advocacy of mandatory retirement as both under- and over-inclusive—that is, it would miss some cases of mental decrepitude and it

69. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 839 ("Admittedly, even given an eighteen-year term, some Justices could still become mentally or physically decrepit during their tenure and continue to serve on the Court." (footnote omitted)).

70. See, e.g., Choi et al., *supra* note 54, at 5 ("[A mandatory retirement age of 70] removes judges who would become incompetent after age 70, but it also removes judges who would remain competent after age 70 and does not remove judges who became incompetent before age 70. These false positive and false negative costs may well be high.").

71. See, e.g., Farnsworth, *supra* note 16, at 263.

72. *Id.*

73. A relevant disability is that which substantially limits the Supreme Court Justice's performance of the essential functions of his or her job. See *infra* note 349.

74. Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 351–364 (2006)).

75. See, e.g., WARD, *supra* note 53, at 247–48; Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 9, at 415, 433; Garrow, *supra* note 57, at 1085–86.

76. See generally Garrow, *supra* note 57; see *supra* note 57 (detailing the different ways in which Garrow defines mental decrepitude in the context of his historical account).

would force out highly functioning Justices simply because of age. This Article also flags concern for the potential effects of mandatory retirement on judicial independence, impartiality, and integrity. Nevertheless, in recognition of the seriousness of the mental disability concern, this Article recommends that all Article III judges, not just Supreme Court Justices, be encouraged toward earlier voluntary retirement and that the Supreme Court adopt a formal mechanism, comparable to the Judicial Conduct and Disability Act, to monitor and address debilitating disabilities among the Justices, age-related or otherwise.⁷⁷

Professor Artemus Ward, like Garrow, has written in favor of mandatory retirement of Supreme Court Justices at age seventy-five out of concern for mental decrepitude.⁷⁸ In addition to decrepitude, Ward grounds his mandatory-retirement recommendation in concern for strategic retirement and the belief that mandatory retirement promotes judicial independence better than does life tenure.⁷⁹ A number of commentators, including Garrow,⁸⁰ however, have disputed the strategic-retirement hypothesis,⁸¹ with Ward himself declaring that “the single most important factor for justices deciding to leave [sic] U.S. Supreme Court is the presence of a formal retirement provision with generous benefits.”⁸²

As for the argument that mandatory retirement promotes judicial independence, Ward does not develop this point other than to assert in conclusion:

Ironically, judicial independence would be strengthened by mandatory retirement. One only has to think of Franklin Roosevelt’s Court-packing assault on the Court to see how vulnerable the justices are to manipulation by the other branches of government. A mandatory retirement age would largely insulate the justices from accusations that either they are too old to keep up with the workload, or that they are hanging on to their seats for partisan reasons.⁸³

Ward’s conclusion that mandatory retirement promotes judicial independence is thus premised on the idea that mandatory retirement safeguards judges from criticism on the grounds of infirmity or partisanship. Safeguarding judges from criticism, however, does not necessarily promote judicial independence because independence relates to the courts’ autonomy vis-à-vis other branches of government and to individual judges’ ability to decide cases free from fear or favor.⁸⁴ Neither institutional nor individual independence is necessarily

77. See *infra* Part III.A.

78. WARD, *supra* note 53, *passim*.

79. *Id.* at 23–24, 240–48.

80. Garrow, *supra* note 42, at 276–77.

81. See *supra* note 52 and accompanying text.

82. WARD, *supra* note 53, at 225.

83. *Id.* at 247.

84. See *infra* notes 316–17 and accompanying text.

harmd by this type of criticism, and mandatory retirement does not bolster courts' and judges' ability to withstand criticism or exercise independent judgment.

Professor Richard Epstein has written in support of mandatory retirement at age seventy *and* fixed terms of service for the Supreme Court, whether introduced together or separately.⁸⁵ Epstein's recommendations are premised in large part on concern for the effects of aging, as there comes a point—approximately at age seventy—where “the traits of wisdom and experience are likely to be overshadowed by a general decline in fitness, energy and innovative ability.”⁸⁶ Beyond that, Epstein asserts that the Court must be subject to “some restriction on the length of service” because it exercises monopoly power over constitutional interpretation.⁸⁷

Lastly, Farnsworth has found the case for age-limit proposals “somewhat stronger” than for fixed-term proposals,⁸⁸ though he has been highly critical of fixed-term proposals.⁸⁹ Although Farnsworth perceives the strongest argument for age limits to be concern for mental decrepitude,⁹⁰ he is quick to note that there “are some arguments against them as well.”⁹¹ These counterarguments include: (1) “the problem of decrepitude is less serious than it sounds,”⁹² constituting only one to two percent of the “nine-hundred man-years” of Supreme Court service in the twentieth century;⁹³ and (2) the decrepitude problem—to the extent it exists—is mitigated by the fact that Justices sit with eight colleagues and have law clerks, who “keep a chambers running without a drop-off in quality remotely commensurate with the justice’s drop-off in functionality.”⁹⁴ Further responding to the mental-decrepitude concern, Farnsworth emphasizes the danger of Justices being “push[ed] . . . out of office while they still are lucid and thus creat[ing] a risk that they will use their time at the Court to angle for attractive situations afterwards.”⁹⁵ For Farnsworth, this presents an actual or apparent threat to judicial impartiality, integrity, and independence because the decisional autonomy of individual Justices may be, or appear to be, compromised by their interest in post-bench employment.⁹⁶

85. Epstein, *supra* note 75, at 419–20, 433.

86. *Id.* at 423.

87. *Id.* at 433.

88. Farnsworth, *supra* note 16, at 251.

89. See *supra* notes 32–33, 39–44 and accompanying text.

90. Farnsworth, *supra* note 16, at 262.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 262–63. Farnsworth does acknowledge the concern with this latter practice. *Id.* at 262.

95. *Id.* at 263.

96. *Id.* (“It need not be a question of bad faith; the greater hazard is a subtle bias reminding its holder that letting down one’s friends now can have disappointing professional consequences later.”).

Farnsworth also notes concern for strategic retirement as a rationale for imposing age limits.⁹⁷ Acknowledging that “[t]here is convincing statistical evidence that [strategic retirement] occurs” and that strategic retirement weakens the case for life tenure,⁹⁸ Farnsworth nevertheless states that it is “hard to say” how often it occurs.⁹⁹ As a result, Farnsworth concludes that it is not at all clear how serious a problem strategic retirement is.¹⁰⁰

C. Return to Practice

Finally, there is a surprising dearth of scholarship on the merits of prohibiting former Article III judges from returning to practice following resignation or retirement. Stras and Scott briefly reference the threat to judicial independence posed by currently serving Justices considering post-bench employment as yet another factor supporting life tenure over fixed terms or mandatory retirement.¹⁰¹ Vicki Jackson notes that a post-employment prohibition (or minimum age requirement for appointment) might preclude the issue of judges using “judgeship[s] as stepping stone[s]” to more lucrative careers.¹⁰² Although Associate Historian and later-Professor Emily Field Van Tassel and her associates provide a detailed historical account of why Article III judges have resigned from the bench, including return to practice,¹⁰³ Professor Ronald Rotunda provides the only extended treatment of the ethical rules and case law governing judges’ post-bench employment inquiries,¹⁰⁴ though Rotunda is focused on whether a sitting federal judge (John Roberts) was required to recuse himself from a case involving the President (*Hamdan v. Rumsfeld*¹⁰⁵) while under consideration for elevation to the Supreme Court.¹⁰⁶

97. *Id.* at 264–65.

98. *Id.* at 264.

99. *Id.*

100. *Id.*

101. Stras & Scott, *supra* note 15, at 1425 (“Even fixed, nonrenewable terms . . . would introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary.”).

102. Jackson, *supra* note 9, at 1002 n.156 (noting the particular utility of these approaches in the case of non-renewable term service).

103. EMILY FIELD VAN TASSEL ET AL., FED. JUD. CTR., WHY JUDGES RESIGN: INFLUENCES ON JUDICIAL RETIREMENT SERVICE, 1789 TO 1992 (1993) [hereinafter FJC REPORT], available at <http://ftp.resource.org/courts.gov/fjc/judgeres.pdf>; Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 355–64 (1993) [hereinafter Van Tassel, *Resignations and Removals*]; see generally Charles T. Fenn, Note, *Supreme Court Justices: Arguing Before the Court After Resigning from the Court*, 84 GEO. L.J. 2473 (1996) (highlighting six former Supreme Court Justices who argued before the Court after stepping down from its bench).

104. Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS 1187, 1190–96 (2006).

105. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 546 U.S. 1002 (2005), *rev'd* 548 U.S. 557 (2006).

106. Rotunda, *supra* note 104, at 1188.

This Article seeks to prompt a wider discussion of these issues by recommending a prohibition on former Article III judges (including Justices) returning to practice.¹⁰⁷

II. JUDICIAL RETIREMENT AND RETURN-TO-PRACTICE RULES AND CONVENTIONS FOR ARTICLE III AND ENGLISH AND WELSH HIGHER JUDICIARIES

A. Life Tenure for Article III Judges

Article III judges have enjoyed life tenure without mandatory retirement since the time of the Constitution's adoption.¹⁰⁸ The Constitutional Convention debates and the *Federalist Papers* reflect a strong commitment to security of tenure during good behavior for Article III judges,¹⁰⁹ drawing on the perceived wisdom of Britain's then-relatively new guarantee of tenure during good behavior for its higher judiciary.¹¹⁰ Both the Virginia and New Jersey plans for the Constitution proposed judicial tenure during good behavior, and both proposals were endorsed by Convention delegates.¹¹¹ Thereafter, tenure in good behavior was included in many of the various draft constitutions prepared after the Great Compromise was reached,¹¹² including

107. See *infra* Part III.B.

108. See U.S. CONST. art. III, § 1, cl. 2.

109. Hamilton described "good behavior" variously in the *Federalist Papers* as having "the requisite integrity" and "requisite knowledge," being of "fit character," and being "qualified to conduct [judicial office] with utility and dignity." THE FEDERALIST NO. 78, at 471–72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

110. See, e.g., *id.* at 472 ("The experience of Great Britain affords an illustrious comment on the excellence of the institution [of judicial life tenure]."). Hamilton and his contemporaries were inspired by Britain's 1701 Act of Settlement and the then-recent 1760 Commissions and Salaries of Judges Act. See *id.*; *infra* notes 194–95 and accompanying text.

111. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–22 & n.10 (James Madison) (Max Farrand ed., 1966) (recounting the Virginia Plan—presented by Edmund Randolph—as containing resolution (9), which states "that a National Judiciary be established to consist of one or more supreme tribunals . . . to hold their offices during good behaviour"); *id.* at 121 (reporting on the proceedings of June 5, 1787 and noting that the delegates agreed to Virginia resolution (9) on judicial tenure during good behavior); *id.* at 244 (recounting the proceedings of June 15, 1787, during which William Patterson presented the New Jersey Plan, containing resolution (5) "that a federal Judiciary be established to consist of a supreme Tribunal the Judges of which . . . to hold their offices during good behavior"); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 44 (James Madison) (Max Farrand ed., 1966) (recounting the proceedings of July 18, 1787, in which the delegates agreed to New Jersey resolution (5) on judicial tenure during good behavior).

112. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 111, at 15–16 (James Madison) (reporting on the Great Compromise on equal representation of the states in the Senate, which was reached on July 16, 1787). The draft constitutions providing for judicial tenure in good behavior include Committee of Detail, I, (Resolution 8 specifically establishes tenure in good behavior), see *id.* at 131–32 (Committee of Detail), Committee of Detail, III, (Section 15 requires that the proposed federal judicial court be comprised of judges "appointed

the final draft constitution approved by the Convention.¹¹³

James Madison and Alexander Hamilton strongly supported the Constitution's guarantee of judicial tenure during good behavior in their *Federalist Papers*.¹¹⁴ According to Madison, respectable opinion and the practice in most states supported the choice of tenure during good behavior.¹¹⁵ Hamilton likewise observed that tenure during good behavior reflected the wise and dominant practice in the states, declaring that "[t]he standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government."¹¹⁶ Not only is it an "excellent barrier to the encroachments and oppressions of the representative body," but Hamilton declared it to be "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."¹¹⁷ Life tenure was understood as essential to judicial independence, integrity, and impartiality.¹¹⁸ Decisional independence could not be expected of judges with temporary appointments,¹¹⁹ and anything less than life tenure would undermine the government's ability to appoint the most qualified judges, given the sacrifice involved in leaving profitable law practices for the bench.¹²⁰

Hamilton specifically rejected the mandatory-retirement rule in his home state's constitution, writing:

The constitution of New York, to avoid investigations that must forever be vague and dangerous, has taken a particular age as the criterion of inability. No man can be a judge beyond sixty. I believe there are few at present who do not disapprove of this provision. There is no station, in relation to which it is less proper than to that of a judge.¹²¹

Dismissing mandatory retirement in part because he understood judges to retain their mental faculties longer than other men,¹²² Hamilton's rejection of New York's mandatory-retirement rule was also informed by the absence of a

during good Behaviour"), *see id.* at 136, Committee of Detail, IV (Resolution 5, clause 5 states that "judges shall hold their offices during good behaviour"), *see id.* at 146, and Committee of Detail, IX (Section 14 allows for judicial tenure during good behavior), *see id.* at 172.

113. *Id.* at 651, 660.

114. *See* THE FEDERALIST NO. 39, *supra* note 109, at 242 (James Madison); THE FEDERALIST NO. 78, *supra* note 109, at 471 (Alexander Hamilton).

115. THE FEDERALIST NO. 39, *supra* note 109, at 242 (James Madison).

116. THE FEDERALIST NO. 78, *supra* note 109, at 465 (Alexander Hamilton).

117. *Id.*

118. *Id.* at 469.

119. *Id.* at 470-71.

120. *Id.* at 470.

121. THE FEDERALIST NO. 79, *supra* note 109, at 474 (Alexander Hamilton).

122. *Id.*

pension for Article III judges.¹²³ Hamilton believed that judges, as public servants dependent on their salaries, should not be dismissed without provision for their financial security simply because they had become “super annuated.”¹²⁴

Since the Founding era, mandatory retirement has been the subject of constitutional-amendment proposals on at least six occasions: four in the nineteenth century and two in the twentieth.¹²⁵ Although Congress did not pass any of the proposed amendments,¹²⁶ an 1869 proposal for mandatory retirement of Article III judges may well have contributed to that year’s enactment of the first-ever judicial pension,¹²⁷ the availability of which increased the likelihood that judges would voluntarily retire.¹²⁸ The 1869 Act introduced the “Rule of 80,”¹²⁹ as it granted Article III judges a pension “equal to their annual salary at the time of retirement, so long as they had reached the age of seventy and served at least ten years.”¹³⁰

Then, in 1937, a proposed amendment mandating that Supreme Court Justices retire at the age of seventy-five became a major alternative to Roosevelt’s “Court packing” plan.¹³¹ This proposed amendment was joined by at least three others that would also have required mandatory retirement for federal judges at age seventy or seventy-five, with retirement at seventy-five

123. See *id.* Pensions for Article III judges were not introduced until 1869. Judiciary Act of 1869, 16 Stat. 44; see Richard L. Vining et al., *Judicial Tenure on the U.S. Supreme Court, 1790-1868: Frustration, Resignation, and Expiration on the Bench*, 20 STUD. AM. POL. DEV. 198, 200 (2006) (discussing judicial-tenure patterns in the pre-pension era).

124. THE FEDERALIST NO. 79, *supra* note 109, at 474–75 (Alexander Hamilton).

125. FJC REPORT, *supra* note 103, at 37–39; Garrow, *supra* note 57, at 1023–26 & nn.134–49, 1034–35 & n.198; Van Tassel, *Resignations and Removals*, *supra* note 103, at 396–400.

126. Kentucky Senator John Pope proposed the first amendment mandating retirement at age sixty-five in 1809, New Hampshire Representative Nehemiah Eastman proposed the second amendment in 1826, which mandated retirement at seventy, a third amendment was proposed in 1836, which mandated retirement at sixty-five, and Representative James Ashley proposed a fourth amendment in 1869, which mandated twenty-year term limits and mandatory retirement at seventy. Van Tassel, *Resignations and Removals*, *supra* note 103, at 396–97.

127. Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. 44, 45 (codified as amended at 28 U.S.C. § 371(a) (2006)).

128. Van Tassel, *Resignations and Removals*, *supra* note 103, at 396–97; see also Stras & Scott, *supra* note 15, at 1440 (indicating that the “1869 Act seemed to have its intended effect” as it prompted judges to retire voluntarily); Richard L. Vining, Jr., *Judicial Departures and the Introduction of Qualified Retirement, 1982–1953*, 30 JUST. SYS. J. 139, 145, 151 (2009) (“Pension eligibility strongly encouraged voluntary departures.”).

129. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 460 (2007) (noting that the rule applied to judges who were at least sixty-five, if their age plus years serving as a judge equaled eighty or more).

130. Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. at 45.

131. Garrow, *supra* note 57, at 996; see *id.* at 1023 (noting that Nebraska Senator Edward R. Burke proposed a constitutional amendment requiring mandatory retirement at age seventy-five just days after Roosevelt’s announcement).

gaining the greatest support.¹³² Although the mandatory retirement proposals failed, largely due to Roosevelt's lack of support,¹³³ Supreme Court Justices were authorized for the first time that year to retire with senior status,¹³⁴ which, as with the availability of pensions, increased the likelihood that they would retire voluntarily.¹³⁵ Article III judges below the Supreme Court level had been authorized to retire on senior status beginning in 1919.¹³⁶ In 1939, Congress authorized voluntary retirement on the basis of disability for all Article III judges.¹³⁷ Full salary was provided to judges with ten or more years of service who retired due to disability, regardless of their age at retirement.¹³⁸

Between 1946 and 1955, American bar leaders conducted a major campaign to adopt a constitutional amendment mandating that Supreme Court Justices retire at seventy-five.¹³⁹ This, like the 1937 proposed amendments, failed to be adopted,¹⁴⁰ but Congress responded in 1948 by providing that any salary increases for active Article III judges would also apply to senior judges,¹⁴¹ further encouraging voluntary retirement. In 1954, judges with fifteen years of service were authorized to retire at age sixty-five.¹⁴²

In the late 1970s, there was one more "significant but . . . unsuccessful" attempt to introduce mandatory retirement—this time by statute.¹⁴³ This attempt was followed by enactment of the Judicial Conduct and Disability Act of 1980, introducing self-monitoring and redress of judicial misconduct and

132. *Id.* at 1023–26 (discussing proposals from Democratic Florida Senator Charles O. Andrews, Democratic Louisiana Senator Allen Ellender, and Democratic California Senator William G. McDoo).

133. *Id.* at 1019–20, 1026.

134. Retirement Act of 1937, ch. 21, 50 Stat. 24 (codified as amended at 28 U.S.C. § 371(b)–(c) (2006)).

135. See Van Tassel, *Resignations and Removals*, *supra* note 103, at 395–98 (discussing Congress's attempts to encourage retirement).

136. See Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157 (codified as amended at 28 U.S.C. § 371(b), (e)). Senior status enables a judge to retire on full salary with regular salary increases, while continuing to hear cases on a reduced-volume basis; it also enables the President to nominate a full-time judge to fill the vacancy. See 28 U.S.C. § 371(b)–(e).

137. See Act of Aug. 5, 1939, ch. 433, 53 Stat. 1204 (codified as amended at 28 U.S.C. § 372).

138. Act of Aug. 5, 1939, § 3, 53 Stat. at 1205. Half salary was provided to those retiring on a disability with less than ten years of service, again regardless of age at retirement. *Id.*

139. Garrow, *supra* note 57, at 1028–43.

140. *Id.* at 1034–38 & nn.196, 198.

141. See Act of June 25, 1948, ch. 646, § 371, 62 Stat. 869, 903 (codified as amended at U.S.C. § 371(b)(1)) (providing that judges taking senior status shall receive "the salary of the office" for the remainder of their lives).

142. Act of Feb. 20, 1954, ch. 6, sec. 4(a), § 371, 68 Stat. 8, 12.

143. Dan M. McGill, *Disincentives to Resignation of Disciplined Federal Judges in the Benefits Package of the Federal Judiciary*, in 2 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 1221, 1224 (1993); see also Garrow, *supra* note 57, at 1059–60 & n.361 (recounting Georgia Senator Sam Nunn's introduction of Judicial Tenure Act, which was to apply to all federal judges).

disability for lower federal court judges.¹⁴⁴ Lastly, in 1984, Congress expanded judicial retirement provisions still further by enabling retirement pursuant to a sliding scale of age (sixty-five to seventy) and Article III service (fifteen to ten years), as long as age and service totaled at least eighty.¹⁴⁵

Today, an Article III judge contemplating retirement has two choices, assuming that he or she satisfies the “Rule of 80.” He or she can retire altogether, receive an annuity equal to the salary he or she earned in his or her last year as a judge, and return to law practice if he or she chooses.¹⁴⁶ Alternatively, he or she can retire on senior status, continue to hear cases, create a judicial vacancy for the president to fill, receive the same judicial salary as if in active service (with regular salary increases), but cannot return to law practice.¹⁴⁷

To complete the historical picture, in addition to the mandatory-retirement proposals and voluntary-retirement provisions that followed, there was a series of proposed amendments to replace life tenure with term limits in the nineteenth and early twentieth centuries. Van Tassel reported that “18 legislative amendments proposed between 1807 and 1879 would have limited judicial terms in office, with the limits ranging from 4 to 20 years.”¹⁴⁸ Professor Michael Mazza, like Van Tassel, recounted a host of proposed amendments that introduced term limits for Article III judges in the late nineteenth and early twentieth centuries,¹⁴⁹ including some that “mandated limits for all federal judges; the others only capped the service of judges on the inferior courts.”¹⁵⁰ According to Mazza, these term-limit proposals “garnered more support than did efforts for an elected judiciary,”¹⁵¹ which was also debated in the late nineteenth and early twentieth centuries.¹⁵² None of the term-limit proposals succeeded in Congress, however.¹⁵³

144. Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 351–364).

145. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 204, 98 Stat. 333, 350 (codified as amended at 28 U.S.C. § 371(c)).

146. See 28 U.S.C. § 371(a).

147. *Id.* § 371(b), (d). 28 U.S.C. § 454 prohibits currently serving federal judges, including senior judges, from practicing law, providing, “Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.” 28 U.S.C. § 454.

148. Van Tassel, *Resignations and Removals*, *supra* note 103, at 396 n.291.

149. Mazza, *supra* note 9, at 143–47.

150. *Id.* at 147.

151. *Id.*

152. See, e.g., Renee Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed’s New York*, 15 GEO. MASON L. REV. 109, 113–14 (2007); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 app. A at 1146 (2010).

153. Mazza, *supra* note 9, at 147.

B. Return to Practice by Former Article III Judges

Just as there is no mandatory retirement for, or term limits on, Article III judges, there is no bar on Article III judges returning to practice after resigning or retiring from the bench.¹⁵⁴ Indeed, substantial numbers of Article III judges have returned to practice following resignation or retirement, both historically and recently.¹⁵⁵

Emily Field Van Tassel's studies, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992* and *Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992* examine Article III judges' reasons for resigning from the bench between 1789 and 1992.¹⁵⁶ Of the 2627 Article III judges who served during that period,¹⁵⁷ Van Tassel found that only seven percent, or 190 judges, had resigned for stated reasons¹⁵⁸ other than age or health.¹⁵⁹ Van Tassel included disability and retirement between

154. See 28 U.S.C. § 371 (2006) (containing no restrictions on a retiring judge's return to practice).

155. See *infra* apps. A, B.

156. See FJC REPORT, *supra* note 103; Van Tassel, *Resignations and Removals*, *supra* note 103. Although the two publications are substantially the same, this Article primarily references the *Resignations and Removals* article published in the *University of Pennsylvania Law Review* because it is the latter of the two publications (and would, presumably, reflect any updates made to the text or data). See Van Tassel, *Resignations and Removals*, *supra* note 103, at 333 author footnote (noting that “an earlier version of this Article was prepared as a report to the National Commission on Judicial Discipline and Removal, while [Van Tassel] was Associate Historian with the Federal Judicial History Office of the Federal Judicial Center”). However, this Article references the Federal Judicial Center report for judicial biographical information because its appendix includes much more detailed information about the judges who resigned than does the *University of Pennsylvania Law Review* article.

157. Van Tassel, *Resignations and Removals*, *supra* note 103, at 345. Van Tassel indicated that the 2627 total “was calculated by counting the number of appointments per President”). *Id.* at 345 n.44. This total appeared to include both Supreme Court Justices and lower Article III judges. See FJC REPORT, *supra* note 103, at 75 (listing the resignation of Associate Justice Abe Fortas).

158. Although Van Tassel indicates in her text that she looked to former judges' stated reasons for resigning, she indicates in her footnotes that she looked at what judges actually did post-bench as well as what they had said. Van Tassel, *Resignations and Removals*, *supra* note 103, at 338, 350 n.62, 352 (explaining that she “speak[s] of ‘reasons’ for resignation throughout [her] Article for the sake of convenience, but it might be more accurate to say ‘reasons judges have offered for resigning, or what they have done after they resigned’”). Van Tassel recognized that the Article III judges in her study may have left the bench for multiple reasons and may not have been fully candid in stating their reasons. *Id.* at 338 (“Where the cause [of why the federal judge left the bench] is not clear, the study indicates the reasons that judges have offered for their departures, although at times these may have been misleading or incomplete.”).

159. *Id.* at 338, 345. At the outset of the FJC report, Van Tassel et al. note that the “study focuses on the 188 judges” who resigned between 1789 and 1992 for reasons other than age or health. FJC REPORT, *supra* note 103, at 2. Later in the FJC report, they refer to 184 federal judges (out of 2627) that left the bench for reasons other than age or health. *Id.* at 7. Despite the numerical difference between Van Tassel's two publications—190 in the *University of Pennsylvania Law Review* article and 188 and 184 in the FJC report—the appendices to both list 291 judges as having resigned between 1789 and 1992, with 101 of the 291 resigning for reasons

1869 and 1919 within the category of “age or health.”¹⁶⁰ More relevantly to this Article’s focus on return to practice, Van Tassel found that less than five percent of the 2627 judges who served between 1789 and 1992 had resigned to take other employment.¹⁶¹ When viewed in this light—as a percentage of the total number of Article III judges serving across time—the return-to-other-employment rate appears small. When viewed as a percentage of those who resigned from the bench, however, the return-to-other-employment rate appears much more significant, constituting one-half of the resignees in the 1789–1992 period (and more than that in the 1993–2010 period), as detailed below.

Why Judges Resign, authored by Van Tassel with Beverly Hudson Wirtz and Peter Wonders for the Federal Judicial Center (FJC), contains an appendix that sets forth details on the Article III service, termination date and reason, and post-service activities of the 291 judges who Van Tassel, Wirtz, and Wonders designated as having resigned between 1789 and 1992.¹⁶² Of the 291 judges listed in the appendix, 190 were identified as having resigned for reasons other than age or health (again, including disability and retirement between 1869 and 1919).¹⁶³ In examining the information contained in the FJC Report, I found

of age or health, leaving 190 judges in each appendix resigning for reasons other than age or health. See *id.* app. 2 at 129–32; Van Tassel, *Resignations and Removals*, *supra* note 103, at 420 tbl.2. In referencing Van Tassel’s findings, this Article uses this 190 figure as the number of judges who resigned for reasons other than age or health between 1789 and 1992.

160. Van Tassel, *Resignations and Removals*, *supra* note 103, at 352. Thus, Van Tassel included only the retirees who retired pursuant to the antecedent to 28 U.S.C. § 371(a)—the Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. 44, 45—which was in effect between 1869 (when the legislature first introduced retirement pensions for those satisfying the then-applicable “Rule of 80”) and 1919 (when the legislature introduced senior status for the lower Article III judiciary). See *supra* note 160. In her study, Van Tassel does not include (a) judges who retired pursuant to § 371(a) after 1919, nor (b) judges who “retired” (in the non-371(a) sense of the term) from Article III service (and all other gainful employment) before the 1869 Act. However, Van Tassel may well have included individuals in this second group in her category of judges resigning for reasons of “age or health,” including disability.

Of note, Van Tassel classified the reasons for judges’ resignations “into five major categories: (1) age and/or health; (2) appointment to other office or pursuit of elected office; (3) dissatisfaction; (4) return to private practice, other employment, inadequate salary; and (5) allegations of misbehavior (including impeachments and convictions).” Van Tassel, *Resignations and Removals*, *supra* note 103, at 351–52.

161. *Id.* at 364 (“The primary reason for resignation outside of age or health is alternative employment.”).

162. FJC REPORT, *supra* note 103, app.

163. See *id.* Of the 291 former judges included in the appendix to the FJC Report, Van Tassel et al. identified 55 judges as having retired, 40 as having resigned for reasons of age or health, and 6 as having resigned on account of disability—leaving 190 judges who resigned for reasons other than “age or health.” See *id.* By comparison, in Table 2 of the appendix to her *University of Pennsylvania Law Review* article, Van Tassel lists 56 judges as having retired, 39 as having resigned for reasons of age or health, and 6 as having resigned on account of disability—also leaving 190 judges who resigned for reasons other than “age or health.” See Van Tassel, *Resignations and Removals*, *supra* note 103, app. at 408 tbl.1.

that 96, or 50.53%, of these 190 judges had returned to practice at some point following their bench service.¹⁶⁴ For purposes of this analysis, I defined “practice” as work as a lawyer or lawyer-consultant¹⁶⁵ in the public or private sector, not including work as a neutral arbitrator or mediator. I included all judges who had returned to practice at some point after resigning from the bench because law practice by former judges—whether immediately upon resignation or later—raises concerns for actual or perceived compromise of judicial independence, impartiality, and integrity.

I note that my calculation of ninety-six resigned Article III judges returning to practice is less than what Van Tassel found to be the number of resignees pursuing other employment, including return to practice, between 1789 and 1992. Although stated as a percentage of judges rather than an absolute number, Van Tassel’s finding that “less than five percent” of all Article III judges who served between 1789 and 1992 had pursued post-bench employment, including law practice,¹⁶⁶ translates into approximately (though “less than”) 131 judges, more than the 96 whom I identified as having returned to practice from the appendix to the FJC Report.¹⁶⁷ The difference in number can be explained by Van Tassel’s inclusion of former judges who obtained other governmental appointments, including executive-branch appointments and state-court appointments, or who ran for elected positions, in addition to those who returned to practice.¹⁶⁸ Approaching the ninety-six judges who returned to practice as a percentage of Article III judges serving between 1789 and 1992, I found a 3.65% return-to-practice rate for this period, compared with a “less than five percent” rate for those pursuing other employment over the same period.¹⁶⁹

To complement Van Tassel’s 1789–1992 study, specifically regarding return to practice, I compiled a list of all Article III judges who had resigned between January 1, 1993 and December 31, 2010 and examined these judges’ post-

164. See *infra* app. A. The names and post-bench affiliations of the ninety-six Article III judges who returned to practice at some point after resigning between 1789 and 1992 is included in Appendix A. Because the 190 resignees for reasons other than “age or health” included 15 judges who resigned during the Civil War out of loyalty to the Confederacy, a second return-to-practice rate was calculated for the 1789 to 1992 resignees that excluded the Confederate resignees. Excluding all those who had resigned for reasons of age, health, disability, retirement (1869-1919), and loyalty to the Confederacy, left 175 Article III resignees, of whom 91, or 52.00%, returned to practice (public or private) at some point following resignation from the bench. See *infra* app. A (designating with an asterisk those who resigned to return to the Confederacy and thereafter also returned to practice).

165. There did not appear to be any former Article III judges who were designated as having resigned for reasons other than “age or health” acting as lawyer-consultants during this period. *Id.*

166. See *supra* note 161 and accompanying text.

167. FJC REPORT, *supra* note 103, app. at 52.

168. *Id.*

169. See *infra* app. A; see *supra* note 162 and accompanying text.

bench activities to determine the contemporary return-to-practice rate.¹⁷⁰ Sixty-six percent of the 1993–2010 resignees—twenty-one of thirty-two—returned to practice. For retirees during this period, I found that 40.66%—thirty-seven of ninety-one—returned to practice. Combining the data, 47.15%—58 of 123—of Article III judges who resigned or retired between 1993 and 2010 returned to practice at some point following their bench service.¹⁷¹ To conduct this analysis, I used the Federal Judicial Center’s judicial biographical database to determine who resigned and who retired (pursuant to § 371(a), not senior status¹⁷²) during this period. I then examined public sources to determine post-bench return to practice. As above, I defined “practice” as work as a lawyer or lawyer-consultant in the public or private sector, but not as a neutral arbitrator or mediator. To avoid overstating the return-to-practice rate, any uncertainty about whether a former judge had returned to practice caused that judge to be treated as not having returned. As a result, my data may understate the return-to-practice rates for judges resigning and retiring between 1993 and 2010.¹⁷³

In concluding this analysis, I note that the return-to-practice rate as a percentage of resigning judges was fifty percent between 1789 and 1992 (or fifty-two percent, if the Confederate resignees are excluded) and sixty-six percent between 1993 and 2010.¹⁷⁴ I urge caution, however, in comparing the

170. See *infra* app. B (detailing this author’s methodology and findings).

171. *Id.*

172. I excluded senior judges because they may still hear cases and are therefore barred from practice. See 28 U.S.C. § 371(b) (2006); *supra* note 147 and accompanying text.

173. Returning to Van Tassel’s framework of analyzing the data in terms of percentage of the total number of Article III judges serving during the relevant period, I determined that the total number of Article III judges serving between 1993 and 2010 was 1811. See *Biographical Directory of Federal Judges*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/export.html> (last visited July 19, 2011). This figure includes Supreme Court Justices and counts judges who were elevated to another Article III court during this time as one judge, rather than two judicial appointments. Of these 1811 judges, 21 (of 32) resignees returned to practice; in other words, 1.16% of all those serving between 1993 and 2010 resigned and subsequently returned to practice. This is less than the 3.65% who resigned and returned to practice that I calculated for the 1789–1992 period and less than the under 5% who resigned to pursue other employment that Van Tassel found for 1789–1992. See *supra* text accompanying note 162.

The difference in these percentages may be explained, in part, by the passage of time. Much of the 1789–1992 time period is remote, resulting in a higher percentage of judges who left the bench during that period than compared to judges serving during the 1993–2010 period. Stated otherwise, because the 1993–2010 period is far less remote in time, a far smaller percentage of the total number of judges serving during this period have left the bench for whatever reason, including to return to practice. Because changes in judicial-retirement provisions affect the reasons for and mechanisms by which judges have left the bench over time, caution should be used when comparing these periods. See Van Tassel, *supra* note 104, at 398 (acknowledging difficulties in drawing conclusions about resignation patterns across time, given changes in judicial retirement provisions).

174. See *infra* apps. A, B.

1789–1992 and 1993–2010 resignation data, given intervening changes in judicial retirement provisions affecting the reasons for, and mechanisms by which, judges have left the bench.¹⁷⁵

Turning to the provisions governing former Article III judges' return to practice today, the *Code of Conduct for U.S. Judges*¹⁷⁶ provides that *whether* a judge may return to practice, rather than *how* the judge may conduct his or her job search, is a matter for states to regulate because it involves a former judge acting in his or her capacity as a lawyer.¹⁷⁷ Because in many states judges may be removed from office through elections,¹⁷⁸ it is unsurprising that most states do not prohibit former state court judges from practicing law following bench service in recognition that some judges will lose their retention or reelection bids before they are ready to retire from gainful employment. This same rationale does not apply to life-tenured Article III judges.

Despite the absence of a bar on return to practice in most states, a number of states place restrictions on how currently serving judges may pursue post-bench employment. The New Jersey Supreme Court, for example, made clear in *DeNike v. Cupo* that the safest course for judges interested in post-bench employment is to wait until after their retirement to approach any law firms, thereby avoiding the actuality and appearance of partiality.¹⁷⁹ As another example, Massachusetts does not allow a judge to announce his or her upcoming affiliation with a law firm when announcing his or her departure from the bench out of concern that it would lend the prestige of judicial office to the firm.¹⁸⁰

Although the *Code of Conduct for U.S. Judges* is silent on whether a former Article III judge may return to practice in recognition that it is a matter for the states to regulate,¹⁸¹ the Committee on Codes of Conduct of the Judicial Conference of the United States¹⁸² has interpreted the *Code* as implicitly

175. See *supra* note 173.

176. CODE OF CONDUCT FOR U.S. JUDGES (2011). The Judicial Conference of the United States (Judicial Conference), the governing body of the U.S. Courts, adopted the *Code of Conduct*, which addresses issues of judicial independence, integrity, and impartiality, among others. *Id.* Canons 1–2. The *Code of Conduct* is not self-enforcing or binding on judges. Heather M. Clark, Note, *The Supreme Court's Indecent Proposal: Repealing the Honoraria Prohibition of Ethics in Government Act of 1978*, 87 CORNELL L. REV. 1475, 1490 (2002). Rather, the *Code* provides guidance to judges and can be the subject of complaints lodged with chief circuit judges pursuant to the Judicial Conduct and Disability Act. See 28 U.S.C. § 351 (2006) (outlining the procedure for filing a complaint against a judge).

177. CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (“A judge should perform the duties of the office fairly, impartially and diligently.”).

178. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. BAR J. 904, 905 (1996).

179. 958 A.2d 446, 457 (N.J. 2008).

180. Comm. on Judicial Ethics, Supreme Judicial Court, CJE Op. No. 2008-5 (2008).

181. See *supra* note 177 and accompanying text.

182. The Judicial Conference conducts much of its business through committees, including the Code of Conduct Committee. *Organization*, U.S. CTS., <http://www.uscourts.gov>

allowing former judges to return to practice.¹⁸³ In an advisory opinion,¹⁸⁴ the Committee interpreted Canon 3,¹⁸⁵ which addresses impartiality, as providing guidance on *how* judges can conduct post-bench employment inquiries.¹⁸⁶ More specifically, the Committee's opinion clarified when a judge must recuse him- or herself from hearing a matter because of his or her post-bench employment inquiries.¹⁸⁷ Framed in terms of what explorations a judge may undertake, the Opinion instructs: "After the initiation of any discussions with a law firm, no matter how preliminary or tentative the exploration may be, the judge should recuse on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned."¹⁸⁸ In providing guidance on how judges should decide which firms to approach, the Opinion counsels:

At one extreme, a judge steers far from any impropriety or appearance of impropriety by negotiating only with firms that have not appeared before the judge. At the other extreme, a judge should refrain from negotiating with a firm if the firm's cases before the court are so frequent and so numerous that the judge's recusal in those cases (which would be required) would adversely affect the litigants or would have an impact on the court's ability to handle its docket.¹⁸⁹

In concluding this section, I note that not all federal judgeships are created equal when it comes to return-to-practice rules. Although Article III judges do not lose their retirement annuities upon returning to practice so long as they are fully retired (i.e., so long as they are not retired on senior status),¹⁹⁰ non-Article III federal judges lose their retirement annuities if they return to practice. For

/FederalCourts/JudicialConference/organization.aspx (last visited June 18, 2011). As its name suggests, the Code of Conduct Committee is charged with drafting and amending the *Code of Conduct for U.S. Judges* and issuing opinions interpreting the *Code* in response to judges' inquiries. CODE OF CONDUCT FOR U.S. JUDGES Canon 2.

183. See Comm. on Codes of Conduct, Advisory Op. No. 84 (2009), available at www.uscourts.gov/uscourts/RulesandPolicies/conduct/Vol02B-ch02.pdf (addressing the process of seeking post-judicial employment).

184. *Id.* The Committee's published advisory opinions are an important resource for understanding the *Code of Conduct*, though they, like the *Code* itself, are not binding. See, e.g., *Draper v. Reynolds*, 369 F.3d 1270, 1280 (11th Cir. 2004).

185. CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (providing that a judge shall be fair and impartial at all times and "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned").

186. Comm. on Codes of Conduct, Advisory Op. No. 84, *supra* note 183.

187. *Id.*

188. *Id.*

189. *Id.*; see also *PepsiCo, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985) (emphasizing that a judge's failure to recuse himself when his agent contacted firms appearing before him about potential post-bench employment was a violation of a judge's obligation to act impartially).

190. See 28 U.S.C. § 371 (2006) (remaining silent on the effect of return to legal practice on an Article III judge's retirement annuity).

example, former federal bankruptcy and magistrate judges forfeit their retirement annuity rights if they return to law practice or accept any other employment with the U.S. government after retiring from the bench.¹⁹¹ Former Court of Federal Claims judges forfeit their retirement-annuity rights if they engage in practice against the United States or, as above, accept any employment with the U.S. government after retiring from the bench.¹⁹² As for how to explain this difference in treatment, it is almost certainly due in part to the lesser status and lack of constitutional solicitude afforded non-Article III judges. In the case of Court of Federal Claims judges, it likely also rests with concern for conflicts of interest arising from the simultaneous receipt of a retirement annuity from the entity against which the former judge as lawyer is representing a client.

C. Life Tenure with Mandatory Retirement for Higher Court Judges in England and Wales

Higher court judges in England and Wales gained some security of tenure for the first time with the 1701 Act of Settlement's provision for judicial service during good behavior and removal only by Address (to the monarch) by both Houses of Parliament.¹⁹³ In 1760, tenure during good behavior was assured for the duration of higher court judges' lives, rather than the life of the monarch appointing them.¹⁹⁴ Then, in 1799, judicial pensions were

191. 28 U.S.C. § 377(m)(1)(A) (providing for forfeiture of retirement annuity for any bankruptcy or magistrate judge who practices law post-retirement); *Id.* § 377(m)(3) (requiring forfeiture of retirement annuity for any bankruptcy or magistrate judge who receives "compensation for civil office or employment under the United States Government" for the period in which compensation is received).

192. *Id.* § 178(j)(1) (providing for forfeiture of retirement annuity rights of retired Court of Federal Claims judge who "represents (or supervises or directs the representation of) a client in making any civil claim against the United States or any agency thereof"); *Id.* § 178(j)(3) (providing for forfeiture of retirement annuity rights of retired Court of Federal Claims judges who "accept[] compensation for civil office or employment under the Government of the United States" for period in which compensation is received).

193. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.). Before 1701, the king or queen could dismiss higher court judges for any or no reason, thereby depriving judges of decisional independence. DIANA WOODHOUSE, *THE OFFICE OF THE LORD CHANCELLOR* 25-26 (2001).

194. See Commissions and Salaries of Judges Act, 1760, 1 Geo. 3, c.23 (Eng.). Before the Act, English monarchs could, and did, terminate their predecessors' judges upon their own elevation to the throne. For example, Anne, on her accession to the throne, called for the termination of all then-serving judges, despite the 1701 Act's guarantee of tenure in good behavior. ROBERT STEVENS, *THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION* 10-11 (2002); see also JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 656 (2009).

introduced, providing practical means for voluntary retirement for the first time.¹⁹⁵

Judicial tenure in good behavior remained in effect until the late 1950s. At that time, the Judicial Pensions Act 1959 introduced mandatory retirement at age seventy-five for otherwise life-tenured higher court judges in England and Wales.¹⁹⁶ In advocating seventy-five as the age of mandatory retirement, the 1959 Act's sponsors sought to encourage the appointment of younger, more "in-touch" judges.¹⁹⁷ Professor Robert Stevens has observed that the 1950s bench "surely contained its share of scholarly, fair, and decent men. It also had more than its share of cantankerous, prejudiced, intimidating, and boorish judges, constrained by no retirement age."¹⁹⁸ According to Stevens, the 1950s was a turning point for English courts insofar as "one could see a slowly changing attitude to judicial decision-making," including greater creativity and engagement with public policy.¹⁹⁹ In defining this turning point as the decade between 1955 and 1965, Stevens and Abel-Smith observed that, in "1955 it seemed as if the judges and the law . . . were becoming increasingly irrelevant to the operation of the modern state."²⁰⁰ Continuing, Stevens and Abel-Smith noted that "during the decade which began in 1955, there was a halt in declining importance of the judiciary, and a greater attempt to analyse the role of judges in a modern democracy."²⁰¹

According to Stevens and Abel-Smith, it was Lord Kilmuir, as Lord Chancellor between 1954 and 1962, who "restore[d] power to the courts."²⁰² Stevens and Abel-Smith argue that the introduction of the retirement rule and subsequent expansion of the judiciary²⁰³ were integral to Kilmuir's efforts to increase the courts' capacity to respond to the social needs of the day by

195. DANIEL DUMAN, *THE JUDICIAL BENCH IN ENGLAND 1727–1875: THE RESHAPING OF A PROFESSIONAL ELITE* 124–25 (1982) (finding that the establishment of the pension system largely achieved the desired results by encouraging judges to retire rather than die in office).

196. Judicial Pensions Act, 1959, 8 Eliz. 2, c. 9, § 2 (U.K.). The Act was applied prospectively. ROBERT STEVENS, *THE INDEPENDENCE OF THE JUDICIARY: THE VIEW FROM THE LORD CHANCELLOR'S OFFICE* 89, 167 (1993).

197. STEVENS, *supra* note 196, at 167; *see also* STEVENS, *supra* note 194, at 37–39.

198. STEVENS, *supra* note 194, at 37.

199. *Id.* at 34–35.

200. BRIAN ABEL-SMITH & ROBERT STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750–1965*, at 293–94, 299 (1967).

201. *Id.* at 294.

202. *Id.*

203. The number of High Court and Court of Appeal judgeships in the 1950s was approximately one-third of what it was in 2002. STEVENS, *supra* note 194, at 37. Lord Kilmuir successfully petitioned Parliament to expand the judiciary in 1960, enabling him to appoint an unprecedented number of judges. *See, e.g.*, ABEL-SMITH & STEVENS, *supra* note 200, at 269–71.

engaging more deeply in the shaping of public policy,²⁰⁴ as Kilmuir sought to make the courts “more relevant and less formalistic.”²⁰⁵

Kilmuir also attributed his support for mandatory retirement to concern for older judges’ competence, explaining, “senescence is too difficult for anyone to judge for themselves.”²⁰⁶ A 1956 *Economist* article echoed this sentiment, observing that “judges were allowed to continue ‘in a job which requires the keenest faculties at an age when other men are deemed suitable only for some gentle gardening.’”²⁰⁷ Before the 1959 Act, Lord Chancellors and Lords Chief Justice expended considerable effort, according to Stevens, “eas[ing] out those who were past their prime.”²⁰⁸

The 1993 Judicial Pensions and Retirement Act (1993 Act) reduced the mandatory retirement age from seventy-five to seventy—albeit granting the Lord Chancellor discretion to extend individual judges’ service to seventy-five.²⁰⁹ It also expanded the number of judicial offices subject to mandatory retirement²¹⁰ and increased the length of service required for judicial-pension eligibility from fifteen to twenty years.²¹¹ By increasing the pension-eligibility requirement at the same time that it reduced the mandatory retirement age, the 1993 Act significantly limited the pool of candidates willing to be considered for judicial office, as some lawyers were disinclined, or thought themselves unable, to leave lucrative law practices for judgeships as early as age fifty, which would be necessary to qualify for pensions upon mandatory retirement at age seventy.²¹²

204. See STEVENS, *supra* note 194, at 34 (quoting Kilmuir calling for law to be used “in the solution of the great problems of a modern state,” including those related to regulation of business competition); STEVENS, *supra* note 196, at 166–67.

205. STEVENS, *supra* note 194, at 39–40. Exemplary of this change, Kilmuir as Lord Chancellor oversaw the appointment of Law Lords, who viewed “the law-making function of judges” as “‘obvious.’” ABEL-SMITH & STEVENS, *supra* note 200, at 297.

206. VISCOUNT KILMUIR, *POLITICAL ADVENTURE: THE MEMOIRS OF THE EARL OF KILMUIR* 299, 302 (1964).

207. *Judges Summed Up*, THE ECONOMIST, Dec. 15, 1956, at 947, *cited in* KILMUIR, *supra* note 206, at 302.

208. STEVENS, *supra* note 196, at 89.

209. Judicial Pensions and Retirement Act, 1993, c. 8, § 26 (U.K.). Some scholars have criticized the provision that empowered the Lord Chancellor to exercise discretion in extending individual judges’ terms as a threat to judicial independence. See, e.g., KATE MALLESON, *THE NEW JUDICIARY: THE EFFECTS OF EXPANSION AND ACTIVISM* 213–14 (1999).

210. Judicial Pensions and Retirement Act, 1993, c. 8, sch. 5, § 26 (U.K.). The 1993 schedule contained more than three pages of affected offices, whereas the 1959 Act had only a single paragraph of affected positions. *Id.*; Judicial Pensions Act, 1959, 8 Eliz. 2, c. 9, sch. 1 (U.K.).

211. Judicial Pensions and Retirement Act, 1993, c. 8, § 3 (U.K.).

212. See Roger Trapp, *Bringing Judges into the Real World*, INDEPENDENT, Apr. 5, 1995, <http://www.independent.co.uk/money/spend-save/bringing-judges-into-the-real-world-1614280.html> (discussing the potential disincentive of becoming a judge when, in order to receive a pension, one must be on the bench by age fifty).

That the mandatory retirement age was lowered, rather than raised, thirty-four years after its first enactment, despite people living and working longer, is a bit curious, but can be explained, in part, by some of the Act's proponents' interest in increasing judicial diversity.²¹³ Whether the Act would actually further judicial diversity was contested at the time and remains largely unrealized today.²¹⁴ As Professor Kate Malleson notes, the average age of the higher court judiciary has decreased only modestly following the adoption of the mandatory-retirement rules,²¹⁵ and diversification by sex, race, and ethnicity has been even more modest,²¹⁶ principally concentrated at the lower

213. 215 PARL. DEB., H.C. (6th ser.) (1992) 425–87 (U.K.). In the early 1990s, there was one woman and no racial minorities on the Court of Appeal, and three women and one racial minority on the High Court. STEVENS, *supra* note 196, at 177; *see also infra* note 217 (discussing current statistics on women and racial and ethnic minorities on the English and Welsh bench).

214. *See* Kate Malleson, *Diversity in the Judiciary: The Case for Positive Action*, 36 J.L. & SOC'Y 376, 378–79 (2009); *see also* SELECT COMMITTEE ON THE CONSTITUTION, MEETING WITH THE LORD CHIEF JUSTICE AND THE LORD CHANCELLOR REPORT, 2010–11, H.L. 89, at 56–57 (U.K.) [hereinafter MEETING WITH THE LORD CHIEF JUSTICE AND THE CHANCELLOR REPORT]. Questioning the Lord Chancellor, Lord Pannick observed that the senior judiciary remained composed primarily of white males and posited that public confidence in the judiciary may wane as a result. MEETING WITH THE LORD CHIEF JUSTICE AND THE CHANCELLOR REPORT, *supra*, at 56.

215. *See, e.g.*, MALLESON, *supra* note 209, at 104 (“The introduction of a mandatory retirement age has removed the very old from the bench but the age profile of the senior judges is still heavily weighted to late middle age and early old age.”).

216. The Ministry of Justice reports that the 2010 composition of the English and Welsh judiciary was 20.6% female and 4.8% historic minorities. MINISTRY OF JUSTICE, IMPROVING JUDICIAL DIVERSITY, ADVISORY PANEL ON JUDICIAL DIVERSITY 2010, U.K. 66 tbl.2 (2011), available at <http://www.justice.gov.uk/downloads/publications/policy/moj/judicial-diversity-report-2010.pdf>. Most of the non-traditional judges were concentrated at the lowest levels of the court system. *See infra* note 213.

Focusing on the higher judiciary (again, constituting the High Court, the Court of Appeal, and, as of October 2009, the U.K. Supreme Court in place of the Appellate Committee of the House of Lords), the April 2009 report of the Judiciary of England and Wales shows that there were no minority ethnic judges among the Law Lords or Court of Appeal justices and only three minority ethnic judges among the eighty-five High Court judges participating in the survey. *See 2009 Annual Ethnicity Statistics*, JUDICIARY ENG. & WALES, <http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-stats-and-gen-overview/annual-ethnicity-statistics/annual-ethnicity-statistics-2009> (last visited Aug. 11, 2011). At the time, there were 159 judges serving on the higher courts, 109 on the High Court, 38 on the Court of Appeal, and 12 on the Appellate Committee of the House of Lords. *Id.*; *see also* PROFESSOR LIZZIE BARMES ET AL., EQUAL JUSTICE INITIATIVE, EVIDENCE TO THE HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION INQUIRY INTO THE JUDICIAL AMENDMENT PROCESS 2 (2011) [hereinafter EQUAL JUSTICE INITIATIVE], available at <http://www.law.qmul.ac.uk/eji/docs/EJI%20submission%20INQUIRY%20INTO%20THE%20JUDICIAL%20APPOINTMENTS%20PROCESS.pdf> (reporting that 12.8% of higher court judges are women; “In fact, the number of women in the Court of Appeal is the same as it was ten years ago and their proportional representation has decreased from 7.5% to 7%”).

court levels and largely unattributable to mandatory retirement.²¹⁷ Diversification of the judiciary by sex, race, and ethnicity, to the extent it has occurred, has been due to profound changes in the demographics of the legal profession and to the use of positive, or affirmative, action by judicial appointment officials, of which Malleon and others assert much more is needed.²¹⁸ Still, in submitting written testimony to the House of Lords Select Committee on the Constitution concerning judicial appointments reform in June 2011, the Equal Justice Initiative, represented by six feminist law professors from leading U.K. law schools, stated that the mandatory judicial retirement age should not be raised from seventy, explaining, "Although experienced judges have much to contribute, progress towards greater diversity will be undermined if retirement ages are raised."²¹⁹

The House of Commons debate on the 1993 Act suggests that, in addition to diversity concerns, the lowering of the mandatory retirement age was also motivated by interest in making judicial retirement ages more uniform throughout the United Kingdom,²²⁰ by concern for older judges' handling of the criminal docket, particularly sentencing matters,²²¹ and by interest in redressing the public's perception of judges as out of touch with modern realities. Conducted by the Law Society, the national solicitors' organization, one survey revealed that sixty-five percent of the public subscribed to the belief that "Judges are out of touch with everyday life and everyday people."²²² Eighty-six percent of respondents to the survey thought "that judges should retire earlier than the present judicial retirement age of 75," and a Mr. Boateng, MP, asserted that "[t]he overwhelming conclusion about the composition of the bench was that judges were too old, too male, too white, and too out of touch."²²³ Only once, however, was age-based mental decline articulated as a

217. See, e.g., CHERYL THOMAS, COMM'N FOR JUDICIAL APPOINTMENTS, JUDICIAL DIVERSITY IN THE UNITED KINGDOM AND OTHER JURISDICTIONS 104 (2005); see also 2009 Gender Statistics, JUDICIARY ENG. & WALES, <http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-states-and-gen-overview/gender-statistics/gender-statistics-judges-in-post-2009> (reflecting disproportionate number and percentage of women at the lowest court level, including 49.65% of deputy masters, the lowest ranked members of judicial hierarchy).

218. See, e.g., Kate Malleon, *Appointments to the House of Lords: Who Goes Upstairs*, in THE JUDICIAL HOUSE OF LORDS, 1876–2009, at 112, 121 (Louis Blom-Cooper et al. eds., 2009); Kate Malleon, *It's Time to Court Women*, TIMES (U.K.), Mar. 31, 2011, at 69 (arguing for greater consciousness on the part of judicial appointments commissions of the importance of judicial diversity because women and racial and ethnic minorities will not simply "trickle up").

219. EQUAL JUSTICE INITIATIVE, *supra* note 216, at 8. EJI describes itself as "committed to working towards gender parity on the bench." *Id.* at 1 n.1.

220. 215 PARL. DEB., H.C. (6th ser.) (1992) 425–87 (U.K.).

221. See *id.* at 447.

222. 538 PARL. DEB., H.L. (5th Ser.) (1992) 725–65 (U.K.) ("The public perception of the judiciary at times lapses into caricature. The picture is of a figure such as Mr. Justice Cocklecarrot – elderly, wearing a wig and ermine, and as narrow-minded as he is short-sighted.").

223. *Id.*

reason for lowering the mandatory retirement age.²²⁴ This is striking, given the modestly prominent role that concern for potential mental decline played in enactment of the 1959 Act.²²⁵

The then-Senior Law Lord, Lord Bingham, criticized the 1993 Act's lowering of the judicial retirement age, calling it contrary to the Law Lords' lived experience:

The reduction of the retirement age from 75 to 70 may in retrospect be recognised as an error There has not in practice been a problem of senile judges who should have retired and declined to do so. And Law Lords, like the rest of the population, live (and, it is hoped, retain their faculties) for longer.²²⁶

In offering this critique, Bingham underscored that "the earlier retirement age is not compensated by earlier appointment to less senior judicial office: the trend is, if anything, upwards."²²⁷ Bingham's statement implicitly referenced the fact that, despite the absence of an official policy or practice of judicial promotion, a judicial career ladder nevertheless exists in England and Wales.²²⁸ Given the length of time it takes to move up the judicial career ladder,²²⁹ the reduction in mandatory retirement age limited the length of time that a judge could serve on the higher or highest courts.²³⁰ To be sure, promotion along the judicial career ladder is not required for appointment to the higher courts, but it is common, as nearly every justice on the U.K. Supreme Court today came up through the higher court ranks.²³¹

Parliament continues to debate the merits of mandatory retirement at seventy, particularly for U.K. Supreme Court Justices. In 2009, Lord Pannick, a highly regarded peer on the House of Lords Constitutional Affairs Committee, asked a government minister "whether [Her Majesty's

224. *Id.*

225. *See supra* text accompanying note 197.

226. Tom Bingham, *The Law Lords: Who Has Served*, in *THE JUDICIAL HOUSE OF LORDS*, *supra* note 218, at 122, 125–26 ("The problem of giving recruits to the Supreme Court time to develop and mature is exacerbated by the current retirement age of 70.").

227. *Id.* at 126. Why judges are not being appointed at a younger age, given the twenty-year service requirement for pension eligibility, is not known.

228. *See, e.g.*, 25 Mar. 2009, *PARL. DEB., H.L.* (2009) 654 (U.K.) (arguing that the lower retirement age wastes the talents of well-qualified judges because of the time it takes for them to work their way up to the top); *see also* CARLO GUARNIERI & PATRIZIA PEDERZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* 43–48 (2002) (noting that a judicial career ladder has grown over time in England and Wales such that "today some type of a career pattern has taken shape Professional full-time judges tend to be chosen from among the ranks of part-time judges").

229. GUARNIERI & PEDERZOLI, *supra* note 228, at 24 (noting that lengthy advocacy qualifications result in older judges being appointed).

230. *See* MALLESON, *supra* note 209, at 104–05.

231. *Biographies of the Justices*, SUP. CT., <http://www.supremecourt.gov.uk/about/biographies.html> (last visited Aug. 8, 2011).

Government] will consider raising the retirement age for Supreme Court justices to 75,” and he was told that the Government was “keeping this issue under review.”²³² Pannick continued:

I thank the Minister for that slightly encouraging response. When he looks at this matter again, will he agree that special consideration should apply to judges of the Supreme Court, in that they are the cream of the judiciary and inevitably take time to rise to the top, normally after serving for several years in the High Court and then in the Court of Appeal?²³³

Pannick concluded, “Is it not therefore a terrible waste of our most valuable judicial resources to dispose of them after a short stay in the Supreme Court?”²³⁴ Reflecting some of the concerns animating England and Wales’ mandatory judicial retirement policy, the government minister responded, “We have to try to strike a balance between retaining experience and ensuring the flow of high quality applicants to the highest judicial office.”²³⁵ Whether the mandatory retirement age will be raised, particularly for the new U.K. Supreme Court, is uncertain.

D. Convention Against Return to Practice for Higher Court Judges in England and Wales

Despite mandatory retirement provisions, the prevailing convention in England and Wales counsels against higher court judges returning to practice following resignation or retirement.²³⁶ The convention against former judges’ return to practice has been articulated most recently, and officially, in the Judges’ Council’s²³⁷ *Guide to Judicial Conduct*²³⁸—a hortatory, rather than mandatory, guide.²³⁹ The relevant section states:

232. 25 Mar. 2009, PARL. DEB., H.L. (2009) 654 (U.K.).

233. *Id.*

234. *Id.*

235. *Id.*

236. See JUDGES’ COUNCIL, GUIDE TO JUDICIAL CONDUCT ¶ 9.1, at 48 (Supp. 2008) [hereinafter GUIDE TO JUDICIAL CONDUCT].

237. The Judges’ Council currently represents a broad array of English and Welsh judges, though it had historically represented only the most senior judges. See *Judges’ Council*, JUDICIARY ENG. & WALES, www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/index/judges-council (last visited July 17, 2011).

238. The Judges’ Council’s *Guide to Judicial Conduct* was first published in 2004 and amended in 2006 and 2008. GUIDE TO JUDICIAL CONDUCT, *supra* note 236, at ii.

239. See Diana Woodhouse, *Judicial Independence and Accountability within the United Kingdom’s New Constitutional Settlement*, in INDEPENDENCE, ACCOUNTABILITY, AND THE JUDICIARY 121, 131 (Guy Canivet et al. eds., 2006) (“Unlike Codes of Conduct in other parts of the public sector, there is no regulatory procedure through which individuals can be held to account for breaching the rules [set forth in the Guide]. The status of the document as a Guide prevents this.”).

The conditions of appointment to judicial office provide that judges accept appointment on the *understanding* that following the termination of their appointment they will not return to private practice as a barrister or a solicitor and will not provide services, on whatever basis, as an advocate in any court or tribunal in England and Wales or elsewhere, including any international court or tribunal, in return for remuneration of any kind, or offer or provide legal advice to any person.²⁴⁰

Although the understanding is that a former judge will not serve as a barrister or solicitor,²⁴¹ “[a] former judge may provide services as an independent arbitrator/mediator and may receive remuneration for lectures, talks or articles.”²⁴² The Guide concludes by cautioning that “[e]ven in retirement a former judge may still be regarded by the general public as a representative of the judiciary and any activity that might tarnish the reputation of the judiciary should be avoided.”²⁴³

Thus, the convention articulates a powerful norm against return to practice. It is not clear, however, when the convention against former judges’ return to practice first developed. Writing in 1993, Stevens noted that the Advisory Group on the Judiciary had observed that “[n]o member of the Higher Judiciary ha[d] returned to the Bar after retirement for nearly three-hundred years and they may no longer do so.”²⁴⁴ Noting that “the assertion was probably not good constitutional law,”²⁴⁵ Stevens flagged the return-to-practice issue as “a largely unexplored” one²⁴⁶ and observed, “It is now not uncommon for appeal judges and some High Court judges to return to their chambers on retirement. While they cannot appear in court or give opinions, they are

240. GUIDE TO JUDICIAL CONDUCT, *supra* note 236, ¶ 9.1, at 48 (emphasis added).

241. The legal professions in England and Wales are divided between solicitors and barristers. See BRIAN ABEL-SMITH & ROBERT STEVENS, *IN SEARCH OF JUSTICE: SOCIETY AND THE LEGAL SYSTEM* 38 (1968). Traditionally, solicitors, whose primary responsibility is to represent clients, had no rights to enter an appearance before the higher courts. RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 218 (1988) [hereinafter ABEL, *LEGAL PROFESSION IN ENGLAND AND WALES*]; ABEL-SMITH & STEVENS, *supra*. Barristers, by contrast, did not interact with clients, but instead argued cases in court. See ABEL-SMITH & STEVENS, *supra*, at 123. This division of responsibility has lessened to a degree following the Courts and Legal Services Act 1990. Courts and Legal Services Act, 1990, c. 41, §§ 27–28 (Eng.). Solicitors can now apply for rights of audience to appear and argue cases in the higher courts, and barristers can interact with clients under certain circumstances. *Id.*; see also RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* 64 (2003) [hereinafter ABEL, *LAWYERS BETWEEN MARKET AND STATE*].

242. GUIDE TO JUDICIAL CONDUCT, *supra* note 236, ¶ 9.1, at 48.

243. *Id.* ¶ 9.2, at 48.

244. STEVENS, *supra* note 196, at 136.

245. *Id.* at 136–37.

246. *Id.* at 137 n.156.

allowed to give affidavits on English law, and have an active arbitration practice.”²⁴⁷

Some commentators have suggested that the development of the convention might have been motivated by concern for actual or perceived conflicts of interest arising from former judges receiving judicial pensions while appearing as advocates before the bench.²⁴⁸ Others pointed to the potential threat to public confidence in the courts if former judges appear to have been “bought” by private interests and the doubt that that might instill as to whether currently serving judges were seeking to curry favor with prospective employers through the judgments they rendered.²⁴⁹

The then-Master of the Rolls²⁵⁰ offered another explanation for the development of the convention, which is that a judge “ceases to be a barrister or a solicitor” when named to a judgeship.²⁵¹ As a result, “on retirement, he lacks any qualification to practice” and cannot, as a practical matter, return as either a barrister or solicitor.²⁵² A similarly pragmatic explanation for the convention recognizes that because all higher court judges are granted a knighthood upon appointment to the bench and a sizeable pension upon retirement, “it was not considered ‘good form’ to return to practi[c]e.”²⁵³ Rather, a knighthood was seen, “in part, as compensation for loss of higher income as a lawyer.”²⁵⁴ One commentator notes that significant problems

247. *Id.*

248. STEVENS, *supra* note 194, at 87.

249. See, e.g., Gordon Borrie, *Judicial Conflicts of Interest in Britain*, 18 AM. J. COMP. L. 697, 706 (1970) (recounting, “Reginald Paget Q.C. asked, ‘Does the Prime Minister consider it desirable for industry to run its eye down the High Court bench and decide whom it will buy?’”); Frances Gibb, *It’s Just the Job for a Retired Judge: The Chance of a Lucrative Return to Private Practice Would Be Allowed Under a Controversial Reform*, TIMES (London), Sept. 13, 2006, at 11 (“Lord Woolf, the former Lord Chief Justice, has already expressed strong opposition to judges being allowed to return to the law. He argued that there was a danger that judges hearing cases involving big City practices might be seen to be influenced by the prospect of a career move at the end of their time on the bench.”).

250. The Master of the Rolls is “Head of Civil Justice, and the second most senior judicial post in England and Wales, after the Lord Chief Justice.” *Biographies*, JUDICIARY ENG. & WALES, <http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/biographies> (last visited Aug. 8, 2011).

251. TOM BINGHAM, *Judicial Ethics*, in THE BUSINESS OF JUDGING: SELECTED SPEECHES AND ESSAYS 69, 84 (2000).

252. Thomas Bingham, *Judicial Ethics*, in LEGAL ETHICS AND RESPONSIBILITY 35, 50–51 (R. Cranston ed., 1995).

253. E-mail from Alexander Horne, Human Rights, Public Law, and Terrorism Specialist, Home Affairs Research Section, House of Commons, Dep’t of Info. Servs., to Author (Feb. 24, 2011, 7:21 AM) (on file with author) [hereinafter E-mail from Alexander Horne]; see also Gibb, *supra* note 249, at 11 (“[S]ome judges argue that lawyers should not be allowed to take the privilege of a knighthood and then return to practice.”).

254. E-mail from Alexander Horne, *supra* note 253.

could arise for the retention of judges if higher court judges were able to retain their knighthood honors after leaving the bench to return to private practice.²⁵⁵

The convention against former judges' return to practice has been enforced by informal norms and understandings. For example, in 1970, Mr. Justice Fisher was roundly criticized for resigning from the High Court bench to pursue business opportunities (and not law practice) in London.²⁵⁶ Lord Chancellor Hailsham became involved, chastising Fisher that High Court judges should approach the bench as if the priesthood, with a lifetime commitment and single-minded devotion.²⁵⁷

According to interviews with legal practitioners and academics for this project, former judges are increasingly doing "end-runs" on the return-to-practice convention,²⁵⁸ with growing numbers of former judges choosing to serve as legal consultants to barristers' chambers or solicitors' firms.²⁵⁹ For example, Mr. Justice Laddie attracted attention when he left the bench to serve as a legal consultant to a solicitors' firm, declaring, "From the isolation of the Bench, I will be returned to the fun and mutual support of working in a team."²⁶⁰ Notably, the former Lord Chancellor, Lord Falconer, in championing the government's effort to end the return-to-practice convention, assured relevant audiences that the government's new policy would not apply to him, declaring it inappropriate for the former official charged with judicial appointments to appear as an advocate before judges.²⁶¹ Nevertheless, Falconer recently joined the London office of Gibson, Dunn & Crutcher, a U.S.-based law firm, as a legal consultant.²⁶²

Mr. Justice Smith's effort to secure post-bench employment with a London solicitors' firm is yet another example of a recent breach of the convention against return to practice.²⁶³ The Court of Appeal and the Lord Chief Justice

255. *Id.*

256. STEVENS, *supra* note 194, at 87.

257. 312 PARL. DEB., H.L. (5th ser.) (1970) (U.K.).

258. See notes on interviews with legal practitioners and academics for this project (on file with author).

259. See, e.g., Frances Gibb, *Lord Chancellor to Review Ban on Judges Returning to Practise Law*, TIMES (London), June 23, 2005, at 26 (discussing how several judges plan to join solicitors' firms as consultants).

260. Joshua Rozenburg, *'Bored' High Court Judge Resigns*, DAILY TELEGRAPH (London), June 22, 2005, at 1; Clare Dyer, *Boredom Forces Judge to Quit*, GUARDIAN, June 23, 2005, <http://www.guardian.co.uk/g2/story/0,,1513546,00.html>.

261. See Gibb, *supra* note 249, at 11 ("Lord Falconer added: 'In case there is any doubt, I am not thinking of myself. I have already said I won't return to practice if there is ever a day when I am no longer Lord Chancellor.'"); see also Frances Gibb, *Straw Won't Allow Judges to Return to the Bar*, TIMES (London), Nov. 6, 2007, at 28.

262. See Press Release, Gibson Dunn, Former Lord Chancellor Lord Falconer Joins Gibson Dunn's London Office (July 8, 2008), available at <http://www.gibsondunn.com/news/Pages/FomerLordChancellorLordFalconer.aspx>.

263. See Frances Gibb, *'Da Vinci Code' Judge Escapes with Reprimand*, TIMES ONLINE (London) (Apr. 18, 2008), <http://business.timesonline.co.uk/tol/business/law/article3774109.ece>.

reprimanded Mr. Justice Smith for failing to recuse himself when the solicitors' firm with which he had spoken about post-bench employment appeared before him after his employment negotiations with them had broken down.²⁶⁴ However, Smith was not reprimanded for engaging in post-bench employment inquiries with the firm; rather, the reprimand came in response to his "wholly inappropriate" exchanges in court after being asked to step down.²⁶⁵ Smith's treatment stands in contrast with the early 1970s plight of Mr. Justice Fisher,²⁶⁶ suggesting greater tolerance of post-bench employment by judges today.

Arguably building on this changed sentiment, in late 2005, the British government—under then-Lord Chancellor Lord Falconer—announced its intention to remove the prohibition against former judges' return to practice.²⁶⁷ Despite its intention, the government lacked authority to effect this change, given the then-recent concordat entered into by the Lord Chancellor and Lord Chief Justice, which transferred most judicial governance matters to the Lord Chief Justice.²⁶⁸ Moreover, the government mischaracterized the convention in referring to it as a "prohibition" that the government intended to "remove."²⁶⁹ Nowhere is there evidence that the convention had ever been formally enacted as an enforceable prohibition.²⁷⁰ Rather, it has been consistently referred to as a "convention" or an "understanding."

²⁶⁴ *Id.*

²⁶⁵ *See id.* (discussing how the judge was "castigated" after failing to recuse himself and for displaying "undoubted animosity" toward one of the partners).

²⁶⁶ *See supra* notes 256–57 and accompanying text.

²⁶⁷ DEP'T OF CONSTITUTIONAL AFFAIRS, RETURN TO PRACTICE BY FORMER SALARIED JUDGES 6–7 (2006) [hereinafter FORMER SALARIED JUDGES], available at <http://www.justice.gov.uk/consultations/docs/cp1506.pdf>. The government had earlier explored this issue in its 2004–05 consultation paper, *Increasing Diversity in the Judiciary*. DEP'T OF CONSTITUTIONAL AFFAIRS, INCREASING DIVERSITY IN THE JUDICIARY, RESPONSES TO DCA CONSULTATION PAPER CP 25/04 at 8, 62–65, 76–77 (2005), available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/judiciary/diversitycp25-04.htm>. In its *Summary of Responses to the Consultation Paper*, the government noted that the majority view was that "the policy on preclusion of return to practice . . . is, perhaps, an outdated policy and consideration should be given as to whether it should be relaxed." *Id.*

The Blair government's proposal to "remove the prohibition" was proximate in time to other government-sponsored judicial reforms, most importantly, the Constitutional Reform Act 2005, establishing a free-standing U.K. Supreme Court independent of the House of Lords for the first time. *See* Constitutional Reform Act 2005, 2005, c.4 (Eng.). In 2004, the Lord Chancellor and Lord Chief Justice entered into a concordat, agreeing on the transfer of much of the responsibilities for judicial governance to the judiciary. DEP'T OF CONSTITUTIONAL AFFAIRS, THE LORD CHANCELLOR'S JUDICIARY-RELATED FUNCTIONS: PROPOSALS (2004), available at <http://webarchive.nationalarchives.gov.uk/=http://www.dca.gov.uk/consult/lcoffice/judiciary.htm#part2>.

²⁶⁸ *Id.*

²⁶⁹ *See* FORMER SALARIED JUDGES, *supra* note 267, at 3.

²⁷⁰ *See id.*

The Judges' Council, representing the judiciary of England and Wales, balked at the government's announcement of its intended change, failure to consult, lack of authority to effect the change, and mischaracterization of the convention as a prohibition.²⁷¹ Nevertheless, the government persisted with its plan to reverse accepted practice, publishing a consultation paper²⁷² entitled, "Return to Practice by Former Salaried Judges."²⁷³ This consultation paper sought feedback on only the question of what safeguards the government should implement when effectuating its plan to "remove the current prohibition on all holders of salaried judicial office returning to legal practice on ceasing to hold judicial office."²⁷⁴

The government asserted diversity as its primary motivation for its proposed policy,²⁷⁵ explaining that "[t]he current prohibition can act as a deterrent to applicants from groups under-represented in the judiciary concerned that they will be unable to progress through the judicial ranks and have no route back into legal practice."²⁷⁶ Although noting evidence existed to support the assertion that ending the convention would diversify the judiciary, the government did not cite any data to support this assertion.²⁷⁷ Indeed, support

271. See JUDGES' COUNCIL, RESPONSE OF THE JUDGES' COUNCIL TO THE DCA CONSULTATION PAPER "RETURN TO PRACTICE BY FORMER SALARIED JUDGES" (Dec. 21, 2006) [hereinafter JUDGES' COUNCIL RESPONSE], available at http://www.judiciary.gov.uk/NR/rdonlyres/FC640846-B950-4807-A517-6AD30B6DECA6/0/practice_response_211206.pdf. The judges' objections relied in substantial part on the 2004 concordat. See, e.g., James Harrison, *Judging the Judges: The New Scheme of Judicial Conduct and Discipline in Scotland*, 13 EDINBURGH L. REV. 427, 427, 433 (2009).

272. The British government regularly uses consultation papers such as this to solicit feedback from the public and other interested parties on proposed legislation. See BETTER REGULATION EXEC., DEP'T FOR BUS., ENTER. & REGULATORY REFORM, CODE OF PRACTICE ON CONSULTATION 7 (2007).

273. DEP'T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER NO. 15/06: RETURN TO PRACTICE BY FORMER SALARIED JUDGES 6-7 (2006) [hereinafter GOVERNMENT CONSULTATION PAPER], available at <http://www.justice.gov.uk/consultations/docs/cp1506.pdf>; see also Gibb, *supra* note 249, at 11. The reference to "salaried" judges in the title is to distinguish typically full-time, salaried judges from typically part-time, "fee paid" judges. See *Becoming a Judge: Qualifications*, JUDICIARY ENG. & WALES, <http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/judges-career-paths/becoming-a-judge#headingAnchor3> (last visited Aug. 1, 2011).

274. GOVERNMENT CONSULTATION PAPER, *supra* note 273, at 3.

275. *Id.*; see also Gibb, *supra* note 249, at 11 ("The plans are aimed at encouraging a greater diversity of people, including young people, women and ethnic minorities, to apply to be judges, Lord Falconer of Thoroton, the Lord Chancellor, said."); Gibb, *supra* note 249, at 26 (reporting on Lord Falconer's address to the Commission for Judicial Appointments, which highlighted the pro-diversity implications of the government's proposed reform).

276. GOVERNMENT CONSULTATION PAPER, *supra* note 273, at 6.

277. The government did, however, reference a report commissioned by the Department of Constitutional Affairs, seeking to ascertain the causes of underrepresentation of certain groups in the judiciary by conducting interviews and discussion groups with current barristers, solicitors, and judges. *Id.* (citing OPINION LEADER RESEARCH, JUDICIAL DIVERSITY: FINDINGS OF A

for this proposition could have been found in academic literature, most prominently in the work of Professor Kate Malleon.²⁷⁸

The government's consultation paper briefly acknowledged arguments against the proposed policy change, including concern for (1) actual or apparent undue influence exerted by former judges returning to the bar as advocates, and (2) currently serving judges currying favor with parties and others to promote their post-bench employment prospects.²⁷⁹ The government responded to these concerns by underscoring the importance of the judiciary's integrity and impartiality and noting the availability of safeguards to minimize apparent or actual conflicts, including its proposed two-year "cooling off" period between retirement and return to practice.²⁸⁰

The Judges' Council opposed the government's plan to "remove the prohibition."²⁸¹ Its Chair, the Lord Chief Justice of England and Wales, reiterated the Council's earlier position that the government lacked the power to make this type of change following the concordat; rather, the Lord Chief Justice declared that the decision is a "matter for the judiciary."²⁸² The Judges' Council also asserted that there was no evidence that lifting the bar on return to practice would increase judicial diversity, the proposed safeguards were unworkable,²⁸³ and the government's proposal would wreak "serious impact[s] on the standing and status of the judiciary."²⁸⁴ On this last point, the Lord Chief Justice warned that lifting the bar "would further open serving judges to accusations of bias and would be detrimental to the public's current perception of the judiciary as independent and impartial."²⁸⁵

CONSULTATION WITH BARRISTERS, SOLICITORS, AND JUDGES: FINAL REPORT 3 (Jan. 2006), available at http://www.dca.gov.uk/publications/reports_reviews/jd_cbsj06.pdf).

278. See, e.g., Kate Malleon, *Selecting Judges in the Era of Devolution and Human Rights*, in BUILDING THE U.K.'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES 306 (Andrew Le Sueur ed., 2004).

279. GOVERNMENT CONSULTATION PAPER, *supra* note 273, at 7.

280. *Id.* at 7–8; *cf. infra* note 420 and accompanying text (noting that a cooling-off period could be considered if a prohibition on return to practice is adopted for Article III judiciary).

281. See JUDGES' COUNCIL RESPONSE, *supra* note 271, at 1–2 (offering the Judges' Council official opposition to lifting the ban in a short statement signed by the chairman); JUDGES' COUNCIL WORKING PARTY, RESPONSE OF THE JUDGES' COUNCIL TO THE RIGHT HONOURABLE LORD FALCONER OF THORNTON, JUDICIAL DIVERSITY: RETURN TO THE PRACTICE BY FORMER JUDGES 3 (2006), available at http://www.judiciary.gov.uk/NR/rdonlyres/0F1A673C-734E-473E-B4CC-CA3FD66E6AAF/0/report_judges_wg_lcj_jan06.pdf.

282. See JUDGES' COUNCIL RESPONSE, *supra* note 271, at 2.

283. The Judges' Council asserted that the proposed safeguards were unworkable in part because they were premised on the requirement that judges serve for a minimum of five years before being eligible to return to practice under the new policy. JUDGES' COUNCIL WORKING GROUP, REPORT OF THE JUDGES' COUNCIL WORKING GROUP ON THE CONSULTATION PAPER CP15/06, at 11–12 (2006), available at http://www.judiciary.gov.uk/NR/rdonlyres/8E6D0ACC-E107-45C7-A517-CB416E4DD204/0/working_party_report_jc_301106.pdf

284. JUDGES' COUNCIL RESPONSE, *supra* note 271, at 1–2.

285. *Id.* at 1.

The Bar Council, representing the barristers, also opposed the government's plan. Noting that the "principal justification for the convention is to maintain the dignity and authority" of judicial office, the Bar Council warned "that commercial law firms in the City of London . . . will be very keen to recruit former Judges and use their recruitment for marketing purposes, here and abroad. We consider that this will detract from the dignity of the Bench and the respect in which it is held."²⁸⁶ Citing the government's own research, the Bar Council emphasized "that the prohibition on return to practice is not a significant barrier [to judicial service] for most people because they see judicial appointment as coming at the end of their careers."²⁸⁷ The Bar Council further cited the government's research, revealing that "most people would not want to return to practice even if they were allowed to do so," and concluded that the government's proposed change would not bring a positive impact on diversity.²⁸⁸

Lastly, the London Solicitors' Litigation Association (LSLA) opposed the government's proposal, underscoring its members' concerns that removing the convention would undermine the public's perception of judicial impartiality and risk harm to London's standing as the international forum of choice.²⁸⁹ Thereafter, LSLA referenced recent experiences of other similarly situated common law countries (specifically the former commonwealth jurisdictions of Ireland and South Africa) that had ended their conventions against return to practice and not seen any impact on judicial diversity.²⁹⁰ In the face of overwhelming opposition, however, particularly from the judiciary, the government abandoned its plan to end the convention against return to practice.²⁹¹

286. THE BAR COUNCIL, RESPONSE TO CONSULTATION PAPER: RETURN TO PRACTICE BY FORMER SALARIED JUDGES 3 (2006) [hereinafter BAR COUNCIL RESPONSE], available at <http://www.barcouncil.org.uk/consultations/pastresponsestoexternalconsultations/ReponsesToConsultationPapers2006/> ("The ethos of the Bench depends, to a large extent, on its permanent severance from the practising profession, and will be likely to be harmed if Judges return in any number to practice as lawyers. Movement backwards and forwards between Bar and Bench (or between the Bench and the solicitors profession) would tend to lower the public estimation of the judiciary.").

287. *Id.* (citing OPINION LEADER RESEARCH, *supra* note 277, at 39).

288. *Id.* (citing OPINION LEADER RESEARCH, *supra* note 277, at 67).

289. LONDON SOLICITORS LITIGATIONS ASSOCIATION, LSLA RESPONSE TO DCA CONSULTATION PAPER CP 15/06 "RETURN TO PRACTICE BY FORMER SALARIED JUDGES" 2 (2006), available at http://www.lsla.co.uk/_data/assets/pdf_file/0019/41356/ReturntoPrivatePractice-FinalLSLaresponse.pdf.

290. *Id.* at 3. Whether or not this is an accurate representation of the effect of lifting other countries' conventions is not known.

291. MINISTRY OF JUSTICE, RETURN TO PRACTICE BY FORMER SALARIED JUDGES: SUMMARY OF RESPONSES 18 (May 11, 2007); Gibb, *supra* note 265, at 28 (reporting that the Government had "ditched controversial reforms that would have allowed judges, including former Lord Chancellors, to go back to work as lawyers after a stint on the bench.").

E. Comparative Conclusions

Having looked to English and Welsh experience to learn more about other approaches to judicial tenure and return-to-practice questions and what reforms the United States might consider for its Article III judiciary, it is apparent that not only were there the usual concerns about the applicability of other legal and judicial systems' rules and practices,²⁹² but that most of the rationales for adopting mandatory retirement in England and Wales were quite different from those that have been offered in support of mandatory retirement or fixed-term service reforms for the Article III bench.²⁹³

As discussed, the initial introduction of mandatory retirement in England and Wales was motivated by concern that the judiciary was out of touch with modern realities, vulnerable to mental failings, and needed to be "more relevant and less formalistic."²⁹⁴ The subsequent lowering of the mandatory retirement age was explained, in large part, by interest in creating judicial vacancies for women and racial and ethnic minorities to fill,²⁹⁵ although concern was again expressed for the judiciary being out of touch, for its questionable handling of criminal cases, and, briefly, for the potential for mental failing (though Lord Bingham was later adamant that senile judges refusing to step down had not been a problem in England and Wales).²⁹⁶

The mental acuity rationale for mandatory retirement, although one of several factors in England and Wales (and a more minor factor at that),²⁹⁷ constitutes *the* central rationale offered for mandatory retirement reform and one of three key rationales cited in support of introducing fixed-service terms for U.S. Supreme Court Justices.²⁹⁸ Concern for "mental decrepitude" therefore motivates U.S. scholars' proposals to reform life tenure to a far greater degree than has been true of the mandatory retirement reform proposals in England and Wales.

292. With the legal and judicial (as well as political, cultural, etc.) differences in mind, this comparison is not intended to suggest a legal import or transplant from England and Wales to the United States, or vice versa, but is rather an invitation to further reflection and understanding. See generally Vicki Jackson, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 8–15 (2010); Sujit Choudhry, *Migration As a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1 (Sujit Choudhry ed., 2006); Tom Ginsburg, *Lawrence M. Friedman's Comparative Law*, in LAW, SOCIETY, AND HISTORY: ESSAYS ON THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN (Robert W. Gordon & Morton J. Horwitz eds., 2011); Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra*, at 67.

293. Compare Part I, with Part II.C–D.

294. See *supra* text accompanying notes 202–07.

295. See *supra* text accompanying note 213.

296. See *supra* text accompanying notes 221–22, 226.

297. See *supra* text accompanying note 318.

298. See *supra* Part I.D.

Next, the English and Welsh concern for judges being out of touch with modern realities and needing to be “more relevant” (and “less formalistic”)²⁹⁹ resonates with one of the principal concerns animating fixed-term proposals in the United States, albeit in a limited way. Calabresi and Lindgren and Carrington and Cramton argue that term limits are preferable to life tenure, in part, because they render judges more democratically accountable to the public, where these authors understand judges to be increasingly out of touch with the will of the people.³⁰⁰ Although the U.S. and English and Welsh concerns for judges being “out of touch” resonate to a degree, the resonance ends when looking at the purposes to which the arguments are put—for an understanding of the Constitution consistent with its text and history as embraced by the American public, which underlies the U.S. term-limit proposals,³⁰¹ and for a progressive understanding of the law’s role in addressing social problems, in the view of Lord Kilmuir and more contemporary English and Welsh reformers.³⁰² Thus, while Kilmuir sought to increase the courts’ capacity to address current issues through the adoption of a mandatory retirement rule, Calabresi and Lindgren and Carrington and Cramton seek to constrain the U.S. Supreme Court’s power by making it more publicly accountable through more frequent appointments that are more reflective of prevailing public opinion.

Finally, the U.S. mandatory-retirement and term-limit proposals have been offered entirely without reference to potential impacts on judicial diversity in stark contrast with the mandatory retirement reforms in England and Wales. None of the leading mandatory retirement proposals (Garrow, Ward, and, to a lesser extent, Epstein) or term-limit proposals (Calabresi and Lindgren, Carrington and Cramton, Oliver, and Powe) assert diversity by sex, race, or ethnicity as a basis for reforming life tenure.³⁰³

Given these important differences, the English and Welsh experience with mandatory retirement may have limited relevance in the context of life-tenure reform for Article III judges. However, the same is not true for the return-to-practice question. Rather, the United States should look to the English and Welsh experience with a convention against return to practice in thinking about its desirability for the Article III judiciary because many of the same concerns apply, specifically the concern for the effects of actual and apparent conflicts of interest on judicial independence, impartiality, and integrity.

299. See *supra* text accompanying note 205.

300. See Calabresi & Lindgren, original version of *Term Limits for the Supreme Court*, *supra* note 9, at 58–59 (celebrating popular understandings of the Constitution grounded in fidelity to text and history); Carrington & Cramton, online version of *The Supreme Court Renewal Act*, *supra* note 9; *supra* text accompanying notes 22–23, 45–46.

301. See *supra* text accompanying notes 45–46.

302. See *supra* text accompanying notes 202–06.

303. See *supra* Part I (containing no discussion of judicial diversity).

Still, two pragmatic factors contributed to the development of the return-to-practice convention in England and Wales that have no applicability in the United States. First, concern for the “bad form” of a higher court judge retaining his knighthood while returning to practice³⁰⁴ has no parallel in the United States. Second, judges cease being barristers or solicitors upon appointment,³⁰⁵ which likewise has no parallel in the United States. In addition to these pragmatic differences, the British government’s 2005–2006 proposal to end the convention was motivated by interest in diversifying the judiciary by sex, race, and ethnicity,³⁰⁶ which has not figured in the Article III return-to-practice discussion, though, as noted before, there has hardly been a discussion. This lack of discussion should change and when it does, possible effects of a return-to-practice prohibition on judicial diversity should be addressed.

As for implementing a return-to-practice prohibition, the circumstances in the United States are significantly different from those in England and Wales. Not only are there distinct differences in the structure and character of the U.S. and English and Welsh legal professions and judiciaries, but, as the British Government’s 2005–2006 effort to end the convention revealed, there was a striking unanimity of opposition to the proposal on the part of organized judges, barristers, and London-based solicitors (though not other solicitors).³⁰⁷ There has not been a similar unanimity of opposition to judges returning to practice in the United States. Quite to the contrary, the *Code of Conduct for U.S. Judges*, published by the Judicial Conference of the United States (JCUS), makes clear that return to practice is a matter for the states, and not the federal judiciary, to regulate because it involves a former judge’s work as a lawyer.³⁰⁸ This contrasts with the English and Welsh Judges’ Council’s *Guide to Judicial Behavior*, which addressed the return-to-practice question in providing guidance to currently serving judges.³⁰⁹ Organized judges and lawyers in the states, as reflected in state legal ethics codes, have not supported prohibiting former judges from returning to practice; rather, both the JCUS and the states have offered guidance on how a judge may pursue the return to practice.³¹⁰ Despite skepticism for the likelihood of its adoption in the United States, I commend consideration of the English and Welsh convention against return to practice for the Article III judiciary out of concern for effects on judicial independence, impartiality, and integrity.³¹¹

304. See *supra* text accompanying notes 253–55.

305. See *supra* text accompanying note 240.

306. See *supra* notes 266–76 and accompanying text.

307. See *supra* notes 281–90 and accompanying text.

308. See *supra* note 177 and accompanying text.

309. See *supra* notes 237–43 and accompanying text.

310. See *supra* text accompanying notes 184–85.

311. See *supra* text accompanying notes 279, 284–85, 288.

III. THE UNITED STATES SHOULD RETAIN LIFE TENURE WITHOUT MANDATORY RETIREMENT OR FIXED-SERVICE TERMS AND PROHIBIT ARTICLE III JUDGES FROM RETURNING TO PRACTICE

This Article recommends retention of life tenure for all Article III judges, rejecting recent proposals for fixed terms of service and mandatory retirement for Supreme Court Justices.³¹² This recommendation is principally informed by concern for the negative effects that altering Article III tenure could have on judicial independence.³¹³ The Article does, however, propose several reforms to respond to concern for judges “staying on the bench too long,”—that is, staying beyond their physical or mental ability to perform the work appropriately.

The Article also recommends prohibiting Article III judges from returning to law practice or legal consulting after serving on the bench. This recommendation is informed by concern for the actual and apparent effects on judicial independence, impartiality, and integrity of former judges pursuing and engaging in post-bench legal employment. This recommendation is also shaped by insights gained from the English and Welsh experience,³¹⁴ which suggests the importance of extending the prohibition to work as a legal consultant as well as lawyer, where both present concerns for potential judicial conflicts of interest.

A. Retaining Life Tenure Without Mandatory Retirement or Fixed Terms of Service for Article III Judges

Among the most important rationales offered by the Founders for Article III tenure during good behavior was the importance of ensuring security of tenure to: (1) safeguard judicial independence, thought essential to the effective functioning of the checks and balances of separated powers;³¹⁵ (2) recruit and retain the best legal minds for the Article III bench;³¹⁶ and (3) provide economic security to Article III judges in the absence of a pension.³¹⁷ Only this third rationale has diminished as an argument for retaining life tenure,³¹⁸ as judicial pensions were introduced in 1869 and thereafter have been periodically expanded in scope and terms of access.³¹⁹

312. See *supra* Part I.

313. See *supra* Part I.

314. See *supra* Part II.D.

315. THE FEDERALIST NO. 78, *supra* note 109, at 469 (Alexander Hamilton).

316. See *id.*; THE FEDERALIST NO. 79, *supra* note 109, at 474–75 (Alexander Hamilton).

317. THE FEDERALIST NO. 79, *supra* note 109, at 473 (Alexander Hamilton).

318. Jackson, *supra* note 9, at 1002 (“Some reasons given at the time for providing life tenure, including the need to avoid judges’ worrying about earning a living after their service, have been basically mooted by the provision of pensions for Article III judges.” (footnote omitted)).

319. See *supra* notes 127–42 and accompanying text.

The first and second rationales for life tenure continue to be important today. First, life tenure without mandatory retirement or term limits continues to promote the institutional and individual independence of Article III judges. It promotes institutional independence because a high degree of security of tenure promotes the judiciary's autonomy to review and interpret the law, critical to the effective operation of checks and balances against the legislative and executive branches.³²⁰ It promotes individual independence because judges are empowered to decide cases as they see fit, free from concern for securing post-bench employment and the effects that could have on the actual or perceived independence, impartiality, and integrity of their judgments.³²¹ In fixed-term or mandatory-retirement schemes, the potential for negative impacts of judges' post-bench employment inquiries on their decisional independence is acute because judges in these situations may be compelled to leave the bench long before they are ready to forego gainful employment.³²² However, this potential negative impact cannot be eliminated through tenure security alone; for that, a prohibition on former judges' return to practice is also required.³²³

Calabresi and Lindgren sought to respond to the judicial-independence concern by asserting that "[t]he eighteen-year nonrenewable term [that they] propose is more than long enough to guarantee judicial independence without producing the pathologies associated with the current system of life tenure."³²⁴ Calabresi and Lindgren also note that their proposal contemplates paying Supreme Court Justices for life, well after their high court service expires,³²⁵ thereby ostensibly preempting any need for judges to consider post-bench employment. Their idea of paying term-expired Supreme Court Justices for life, however, is premised on the former Justices serving as district court or court of appeals judges,³²⁶ which, as noted earlier, may be a hard sell, particularly if they had served as district court or court of appeals judges before

320. See, e.g., Burbank et al., *Reconsidering Judicial Independence*, *supra* note 30, at 9–10; Charles Gardner Geyh, *Customary Independence*, in *INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH*, *supra* note 30, at 160, 162–63.

321. Cf. Farnsworth, *supra* note 16, at 251–52 (emphasizing the importance of Supreme Court Justices' life tenure as protection against removal from office on grounds of public opposition to their rulings).

322. *Id.* at 263–64 (underscoring danger of retiring justices under age- or term-limited systems angling for remunerative opportunities in private practice). But see Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL OF RTS. J. 7, 33 (2001) ("[A] set, non-renewable term may actually promote and sustain judicial independence in the long run—by preserving the legitimacy of the high court as an independent branch of government.").

323. See *supra* notes 283, 288–89 and accompanying text.

324. Calabresi & Lindgren, second version of *Term Limits for the Supreme Court*, *supra* note 9, at 775.

325. *Id.* at 775.

326. *Id.* at 856.

being elevated to the high court, which is increasingly likely given recent promotion patterns in the Article III judiciary.³²⁷

Second, tenure in good behavior without mandatory retirement or non-renewable terms continues to promote the government's ability to recruit and retain excellent judges through its guarantee of job security.³²⁸ By contrast, mandatory retirement or non-renewable terms might deter the best and the brightest from joining the judiciary, as judges and other commentators feared would happen in England and Wales.³²⁹ Moreover, anything short of life tenure would deprive litigants and the public of Article III judges' accumulated expertise, knowledge, wisdom, and skill, as such alternatives would compel judges to leave the bench before they would voluntarily choose to do so.

This Article advocates the retention of life tenure without mandatory retirement or term limits, even though most other Western democratic states have moved to mandatory retirement or fixed-service terms for their high court judges.³³⁰ For example, Australia and Israel mandate judicial retirement at age seventy.³³¹ Canada mandates judicial retirement at age seventy-five, and France and Germany have non-renewable nine- and twelve-year terms for their constitutional court justices.³³² According to Professor Lee Epstein and her coauthors, the leading rationales for adopting term limits in many of these countries is preserving bench quality and promoting judicial independence.³³³ Even within the United States, more than three-quarters of U.S. states mandate judicial retirement, typically at age seventy, although one state, Vermont, mandates judicial retirement at age ninety.³³⁴ Despite its now exceptional

327. See, e.g., Terri Peretti, *Where Have All the Politicians Gone? Recruiting for the Modern Supreme Court*, 91 JUDICATURE 112 (2007).

328. See *supra* text accompanying notes 118–21.

329. 215 PARL. DEB., H.C. (6th ser.) (1992) 425–87 (U.K.). (noting that opponents' concern that mandatory retirement at age seventy "was contrary to the public interest because it would discourage those best qualified to accept judicial office"); see also MALLESON, *supra* note 213, at 104–05 (noting that the 1993 reduction in mandatory retirement age and increase in the pension service requirement led some judges to fear that compelling barristers to give up their careers at age fifty, "just when their earning power was starting to reach its peak," would "deter[] high calibre candidates from considering a move to the bench" (citing Lord Ackner)).

330. See Epstein et al., *supra* note 326, at 23–27 (examining judicial tenure practices of twenty-seven European countries and finding mandatory retirement or nonrenewable terms—or some combination of the two—to be the dominant practice); Jackson, *supra* note 9, at 1002 ("Most other western democracies, including those whose high courts are regarded as independent and of high quality, provide for single nonrenewable terms, mandatory retirement ages, or both."); Resnik, *supra* note 9, at 584 & n.3 ("Most countries provide mandatory ages for retirement or for fixed, non-renewable terms of office.").

331. Resnik, *supra* note 9, at 615 & n.106.

332. *Id.* at 615 & nn.108–09.

333. Epstein et al., *supra* note 326, at 23, 35–36.

334. See, e.g., JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 16.07 (4th ed. 2007) ("Thirty-seven states and the District of Columbia have laws mandating the retirement of

nature, life tenure should be retained for the Article III judiciary because it has worked reasonably well for more than 220 years.³³⁵ Absent compelling reasons to change and evidence that the alternative to life tenure (whether fixed terms or mandatory retirement) is an improvement that does not risk unforeseen negative consequences, Article III tenure should be retained,³³⁶ although several modifications should be introduced to encourage more and earlier voluntary retirements and to provide for Supreme Court monitoring of Justices' misconduct or disability.

To better address concerns for judges staying on the bench too long and developing mental "decrepitude,"³³⁷ this Article supports Stras and Scott's and Resnik's advocacy of expanded pension benefits to encourage voluntary retirement by judges before ill health affects their judicial service (Stras and Scott's so-called incentives approach).³³⁸ Although Stras and Scott (but not Resnik) focus exclusively on the Supreme Court, this Article looks to the entire Article III judiciary to implement its reform recommendation, where the more than 830 lower Article III judges vastly outnumber the nine Justices.³³⁹ Second, this Article recommends extending Stras and Scott's proposal for improving the retirement status (beyond pension benefits) of Supreme Court Justices³⁴⁰ to all Article III judges. Third, it advocates that the Supreme Court adopt a formal, workable system for regulating misconduct and debilitating

judges when they reach a certain age. Two additional states, California and Maine, do not require retirement of judges, but strongly encourage it by reducing or forfeiting a judge's retirement benefits if the judge does not retire by a certain age. The high majority of judicial mandatory retirement provisions set 70 as the age of mandatory retirement, but some provisions set the retirement age of 72 or 75." (footnotes omitted)). See generally BERNARD S. MEYER, JUDICIAL RETIREMENT LAWS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA (1999) (comparing the judicial retirement laws of the fifty states and the District of Columbia). Missouri's mandatory judicial retirement rule was upheld in *Gregory v. Ashcroft*, which concluded that Missouri had a rational basis for using age seventy as the cut-off to redress the "threat of deterioration" among judges. 501 U.S. 452, 473 (1991).

335. See *supra* note 108 and accompanying text.

336. See, e.g., Jackson, *supra* note 9, at 1002 ("[I]f we were starting from scratch in designing an independent judiciary, there would be a range of alternatives to life tenure, some perhaps superior, to consider. But we in the United States have an ongoing working system; we are not starting from scratch; making changes could have unforeseen effects, including a sense of diminished independence born from the direction of the proposed change.").

337. *Id.* at 993 ("[L]ife tenure carries with it foreseeable risks of 'disability' and 'decrepitude,' of judges remaining in office (some for financial reasons) beyond the time when they are at their best." (footnote omitted)).

338. Resnik, *supra* note 9, at 641; Stras & Scott, *supra* note 15, at 1439, 1445-66.

339. Mazza also targets his reform proposals at the lower Article III courts, calling for a statutory limit on number of years served on the court of appeals before "the judge would rotate to a position at the district level." Mazza, *supra* note 9, at 133, 155-62.

340. Stras & Scott, *supra* note 15, at 1455, 1465-66.

disability among its members; the 1980 Act works “reasonably well” for lower federal court judges, but is not applicable to the Supreme Court.³⁴¹

First, pension benefits for all Article III judges, not just Supreme Court Justices, should be expanded to encourage more, earlier retirements, again, before ill health negatively affects judicial service.³⁴² Specifically, regular pension increases should be provided to all retired Article III judges who have satisfied the Rule of 80, and *not just* to those retiring on senior status who continue to hear cases, as is done now. Resnik has advocated using pension benefits and penalties to create incentives for judges to step aside after a number of years.³⁴³ Resnik suggested offering generous pension benefits to judges serving no longer than fifteen years as a way to encourage more earlier retirements.³⁴⁴ Like Resnik, Stras and Scott advocate altering judicial-pension rules to encourage more earlier retirements, albeit just at the Supreme Court level.³⁴⁵ Building on the work of Yoon and others in recognizing that pension eligibility is the most important predictor of judicial retirement for lower court judges (followed by the health of the judge),³⁴⁶ Stras and Scott propose increases in pension benefits to as much as double a Justice’s salary.³⁴⁷ This Article concurs with the idea informing Stras and Scott’s proposal, but recommends a different approach, extending regular salary increases to all retired Article III judges who have satisfied the Rule of 80 or have certified a disability to encourage more earlier retirements by lower federal court judges and not just Supreme Court Justices.

Second, this Article supports Stras and Scott’s recommendation to improve justices’ post-retirement status (beyond generous pension benefits) by providing retired justices with enhanced opportunities to contribute to federal court administration,³⁴⁸ which is also intended to encourage more voluntary

341. See Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 351–364 (2006)); see *supra* note 60 and accompanying text.

342. Cf. Choi et al., *supra* note 54, at 15, 19, 22 (finding that pension eligibility triggers district court judges to take senior status but not full retirement, and finding wealthy district court judges less responsive to pension incentives); Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495, 499 (2005) (“The main finding of the article is that most federal judges step down from active status shortly after qualifying for their pension, but choose to remain on the bench as senior judges.”); Yoon, *supra* note 54, at 145, 161–62, 172 (finding pension eligibility to be the strongest predictor of judicial retirement for lower Article III judges, though not Supreme Court Justices).

343. Resnik, *supra* note 9, at 641.

344. *Id.*

345. Stras & Scott, *supra* note 15, at 1455.

346. *Id.* at 1400–01, 1433, 1447–49; accord Ross M. Stolzenberg & James Lindgren, *Retirement and Death in Office of U.S. Supreme Court Justices*, 47 DEMOGRAPHY 269, 291 (2010) (finding that although political considerations play a role, pension eligibility has “a huge effect” on retirement decisions of Supreme Court Justices).

347. Stras & Scott, *supra* note 15, at 1455; accord David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1439 (2006).

348. Stras & Scott, *supra* note 15, at 1465–66.

retirement. Like pension reform, this Article advocates extending retirement status improvements to all retired Article III judges, *not just* to Supreme Court Justices. Former judges could assist with judicial administration projects, such as service on special commissions to improve civics education or improve judicial pay. Former judges might contribute most effectively in settings such as the Administrative Office of the U.S. Courts, the Federal Judicial Center, and the U.S. Sentencing Commission. Although one critique of this recommendation could be that it sounds like make-work, the idea is to provide engaging, publicly spirited work as an attractive alternative to continuing to hear cases so that judges do not stay on the bench too long. Work on judicial administration projects would enable retired judges to continue to use their accumulated expertise in a publicly recognized way.

Third, the Supreme Court should adopt a formal mechanism for addressing potential misconduct or debilitating disability³⁴⁹ among its own members. The Judicial Conduct and Disability Act of 1980³⁵⁰ authorizes “any person” (presumably including members of the public, litigants, attorneys, judges, and other court personnel) alleging judicial misconduct “prejudicial to the effective and expeditious administration of the . . . courts,” or alleging “mental or physical disability” impeding the discharge of judicial duties, to file a complaint with the clerk of the governing court of appeals, briefly stating the facts “constituting such conduct.”³⁵¹ The Act also empowers the chief judge of the circuit to initiate actions under the Act.³⁵² The 1980 Act specifically excludes from its purview complaints about the merits of judicial outcomes.³⁵³ Rather, as its name suggests, it is exclusively concerned with judicial conduct and disability.³⁵⁴

The 1980 Act has been found to work reasonably well at the lower court level by two federal studies, the National Commission on Judicial Discipline and Removal³⁵⁵ and the Breyer Commission on the Implementation of the

349. For purposes of this discussion, a debilitating disability is that which “substantially limits” a justice from performing the essential functions of his or her job, drawing on the Americans with Disabilities Act definition of a “disability.” See 42 U.S.C. § 12102(1) (2006).

350. Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 351–364 (2006)).

351. Judicial Conduct and Disability Act of 1980 § 3, 28 U.S.C. § 351(a).

352. *Id.* § 351(b).

353. *Id.* § 352(b)(1)(A)(ii).

354. JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 26 tbl.5 (2006) [hereinafter BREYER COMMITTEE REPORT], available at <http://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf>. To date, more complaints have been filed relating to judicial conduct than disability. *Id.*

355. NAT’L COMM’N ON JUDICIAL DISCIPLINE AND REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, 152 F.R.D. 265 (1993) (containing the Commission’s findings and recommendation on issues relating to judicial misconduct); see also JEFFREY N. BARR & THOMAS E. WILLGING, STATEMENT OF ALLEGATIONS AND REASONS IN

Judicial Conduct and Disability Act.³⁵⁶ The Breyer Commission found a modest two to three percent error rate in the normal processing of 1980 Act complaints, based on an in-depth analysis conducted by the Federal Judicial Center and Administrative Office.³⁵⁷ The most serious issue that the Breyer Commission report identified concerned the handling of so-called high visibility complaints by the chief circuit judges and/or circuit judicial councils between 2001 and 2005.³⁵⁸ The Breyer Commission made several recommendations for the improved handling of these complaints, including improved procedures, greater transparency of information about complaints and resolutions, and more effective counseling by the Judicial Conference of the chief circuit judges and circuit judicial councils on how to implement the 1980 Act.³⁵⁹ The Judicial Conference adopted these recommendations.³⁶⁰

According to a number of judges and commentators, the most effective judicial conduct supervision occurs in the shadow of the Act, through informal counseling and encouragement toward retirement.³⁶¹ Former Counsel to the National Commission on Judicial Discipline and Removal Jeffrey Barr and Federal Judicial Center Researcher Thomas Willging found in their 1993 study that significant and meaningful informal counseling and enforcement occurs, and that, along with the process of recertifying senior judges, “the informal process appears to be the primary method for addressing issues of physical or mental disability.”³⁶² According to Barr and Willging, “Chief judges prefer to

CHIEF JUDGE DISMISSAL ORDERS UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 (2002), available at <http://ftp.resource.org/courts.gov/fjc/judgcond.pdf> (undertaking further empirical research for the Commission to address the content of judicial complaints); Stephen B. Burbank & Jay S. Plager, *Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Silence*, 142 U. PA. L. REV. 1, 1 (1993) (describing the various research methods that contributed to the findings of the National Commission on Judicial Discipline and Removal).

356. BREYER COMMITTEE REPORT, *supra* note 354, at 5.

357. *Id.* at 5, 12–13, 107.

358. *Id.* at 67–95.

359. *Id.* at 109–10, 125–26; Arthur Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 242 (2007).

360. JUDICIAL CONFERENCE OF THE U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 2 (2008), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/Misconduct/Jud_conduct_and_disability_308_app_B_rev.pdf; Hellman, *supra* note 359, at 210–11, 219–43 (critiquing the recommendations made by the Breyer Commission and offering additional recommendations for reform).

361. See, e.g., Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 131–44 (1993) (“[T]he informal process appears to be the primary method for addressing issues of physical or mental disability.”); see also Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 312 (1993) (“In the final analysis, the essential point is simply that informal processes serve a critical role in addressing judicial misconduct and disability, and that understanding those processes and their operation is essential to a fuller appreciation of judicial discipline.”).

362. Barr & Willging, *supra* note 355, at 144.

use the informal process because it operates more flexibly and humanely.”³⁶³ Importantly, Barr and Willging observed “the possibility of invoking the formal process appears to reinforce the efficacy of the informal process.”³⁶⁴ Likewise, Professor Charles Geyh found in his evaluation of informal judicial conduct mechanisms for the 1993 study that “[o]f all the disciplinary mechanisms evaluated here, the least formal—communications from chief and peer judges—appear to be utilized the most frequently and successfully.”³⁶⁵ Geyh went on to note that “[t]his is not to suggest that discipline under the Act is unimportant. Indeed, it is in part because a formal disciplinary mechanism is in place that informal means of discipline are so successful.”³⁶⁶ The 2006 Breyer Commission Report echoed these earlier findings, stating: “Based primarily upon our interviews, we conclude that informal efforts to resolve problems remain (as the Act’s sponsors intended) the principal means by which the judicial branch deals with difficult problems of judicial misconduct and disability.”³⁶⁷

Barr and Willging’s, Geyh’s, and the Breyer Commission’s findings are suggestive of the utility of adopting a formal mechanism for monitoring misconduct and disability at the Supreme Court level, in the shadow of which important informal conduct counseling and disability assistance could occur. More specifically, drawing on the 1980 Act’s provision for oversight by chief circuit judges and circuit judicial councils, the Supreme Court should adopt a system of formal oversight by the Chief Justice and a council of Associate Justices. If complaints were filed concerning the Chief Justice’s conduct, the council of Associate Justices could respond. If complaints were filed concerning an Associate Justice’s conduct, the Chief Justice could work with the council to respond. As with the 1980 Act’s operation at the lower court level,³⁶⁸ any conduct and disability mechanism adopted at the Supreme Court level should provide for complaints by the public (including attorneys and litigants), as well as by judges and Justices, and allow for the initiation of actions by the Chief Justice. Also as with the 1980 Act,³⁶⁹ the Supreme Court conduct and disability mechanism should not be a vehicle for complaints about the merits of judicial outcomes. Rather, such complaints should be dismissed and redirected through the normal judicial process, as occurs under the 1980 Act.

363. *Id.*

364. *Id.*

365. Geyh, *supra* note 361, at 311.

366. *Id.*

367. BREYER COMMITTEE REPORT, *supra* note 354, at 7 (“The main problems that the informal efforts seek to address are decisional delay, mental and physical disability, and complaints about the judge’s temperament.”).

368. See *supra* notes 350, 355–56 and accompanying text.

369. See *supra* note 353 and accompanying text.

In sum, the Chief Justice and Associate Justices should adopt a formal conduct and disability monitoring system. Where reliance to date has been on informal oversight by the Chief Justice and anecdotal observation by the Associate Justices³⁷⁰—*not* in the shadow of a formal system—something more formal and effective is needed. Garrow's finding of mental decrepitude among eleven Supreme Court Justices in the twentieth century alone suggests the urgency of this recommendation.³⁷¹ If the Supreme Court fails to adopt a formal monitoring mechanism, then Congress should consider amending the 1980 Act to establish judicial misconduct and disability oversight for the Supreme Court, omitting JCUS review of the Supreme Court Justices' conduct dispositions (as provided in the 1980 Act) because the Supreme Court Justices' conduct determinations should not be reviewed by the lower federal court judges who constitute the JCUS membership.³⁷² Nevertheless, it would be preferable for the Court to adopt an oversight mechanism for itself without necessity of congressional intervention.³⁷³

B. Adopting a Prohibition on Article III Judges' Return to Practice

The United States should prohibit Article III judges from returning to practice, including work as lawyers or lawyer-consultants in the public or private sectors, but not as neutral arbitrators or mediators. This recommendation is grounded in concern for protecting judicial independence, impartiality, and integrity, as reflected in the *Code of Conduct for U.S.*

*Judges*³⁷⁴ and the two federal statutes governing judicial disqualification for bias.³⁷⁵ The recommendation is also informed by English and Welsh experience, where concern for actual and apparent self-dealing by judges and negative effects on judicial independence and integrity contributed to the

370. See *supra* text accompanying notes 365–69.

371. Garrow, *supra* note 57, at 1085; accord Chad M. Oldfather & Todd C. Peppers, *Till Death Do US Part: Chief Justices and the United States Supreme Court* 12–18, 21–22 (Marquette Univ. Law Sch. Legal Studies Research Paper Series, Research Paper No. 11–12, 2011) (underscoring the need for a mechanism to respond to disabilities of Chief Justices, in part because Chief Justices have been more likely to die in office of debilitating disabilities than Associate Justices).

372. But see Paul D. Carrington et al., *Four Proposals for a Judiciary Act of 2009, Proposal II: Disability of Justices*, PAUL DEWITT CARRINGTON (Feb. 9, 2009), <http://paulcarrington.com/Four%20Proposals%20For%20A%20Judiciary%20Act.htm> (proposing JCUS review of reports of debilitating disabilities on the part of Associate and Chief Justices).

373. The Supreme Court could not, of course, remove any of its members for misconduct or disability. That remains within Congress's sole purview. U.S. CONST. art. I., §§ 2, 3; see, e.g., Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213–23 (1993).

374. See *supra* notes 186–89 and accompanying text.

375. 28 U.S.C. §§ 144, 455 (2006). Some of the Code's standards, specifically those regarding disqualification for actual or perceived impartiality, are reflected in these statutes, which are fully enforceable. See *id.*

development of the convention against return to practice.³⁷⁶ The recommendation builds on English and Welsh experience by extending the prohibition to work as legal consultants as well as lawyers, where legal consulting presents many of the same concerns for actual or apparent judicial self-dealing and conflicts of interest as law practice.

Supreme Court Justices and legal scholars have spoken out in recent years against judges resigning or retiring, earlier than they otherwise would have, to return to practice, cautioning that Article III judgeships should not be viewed as stepping stones to lucrative law practices, but as capstones to distinguished legal careers.³⁷⁷ To date, commentators have focused almost exclusively on raising judicial salaries as a means to combat early judicial departures followed by return to practice.³⁷⁸ In examining whether a correlation exists between judicial pay and resignation rates, Albert Yoon found that the “[r]eal salaries had a negligible effect on turnover rates”³⁷⁹ and that the correlation between pension qualification (i.e., satisfying the Rule of 80) and judicial retirement trumps all other factors,³⁸⁰ labeling pensions as the “primary determinant of judicial turnover.”³⁸¹ Yoon did, however, find in a separate study that newly

376. See *supra* text accompanying notes 279, 284–85, 288.

377. Jackson, *supra* note 9, at 995 (“[C]oncerns for decisional independence could arise if serving as a judge became a stepping stone to further advancement in the private sector, rather than the capstone of a legal career.”); see also FJC REPORT, *supra* note 103, at 40 (“Judge Abner Mikva ([former] chief judge of the U.S. Court of Appeals for the District of Columbia Circuit) noted that ‘[t]his is supposed to be the last stop on the road. A judge shouldn’t be thinking about going back to work for a law firm that’s coming before him. That’s unhealthy.’” (alteration in original) (quoting Bill McAllister, *The Judiciary’s ‘Quiet Crisis’: Prestige Doesn’t Pay the Tuition*, WASH. POST, Jan. 21, 1987, at A19)); Michael J. Frank, *Judge Not, Lest Yee be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary “Crisis,”* 87 MARQ. L. REV. 55, 87 (2003) (“When asked why it was important for judges to remain on the bench permanently, Rehnquist responded that federal judgeships are supposed to be ‘lifetime careers rather than a stepping stone to other positions.’”).

378. See, e.g., SUPREME COURT OF THE UNITED STATES [CHIEF JUSTICE’S] 2002 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 2003, 12:01 AM), <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>; SUPREME COURT OF THE UNITED STATES [CHIEF JUSTICE’S] 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (Jan. 1, 2006, 2:01 AM), <http://www.supremecourt.gov/publicinfo/year-end/2005year-endreport.pdf> (claiming that judicial independence is eroded each time a judge leaves the bench because of a low salary); SUPREME COURT OF THE UNITED STATES [CHIEF JUSTICE’S] 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (Jan. 1, 2008, 12:01 AM), <http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf> (stating that judicial salaries are often the same as those of first-year associates at law firms); Stephen G. Breyer, Assoc. Justice, U.S. Supreme Court, Public Hearings of the National Commission on the Public Service: A Time of Crisis and Opportunity (July 15, 2002).

379. Yoon, *supra* note 54, at 174; Yoon, *supra* note 54, at 176 (“[A]ny adverse effect of salary is likely occurring to individuals’ willingness to join the bench, not to remain once confirmed.”); *id.* at 177 (“Whatever dissatisfaction judges may feel over current salary, it does not deter them from remaining on the bench until they vest.”).

380. *Id.* at 145, 161–62.

381. *Id.* at 145.

appointed Article III judges were increasingly wealthy as compared with their predecessors,³⁸² which could lessen the need, actual or perceived, to resign to pursue lucrative practice opportunities.³⁸³

The ethical desirability of Article III judges pursuing post-bench employment has received surprisingly little attention in the academic literature and case law to date.³⁸⁴ In surveying senior judges about the issue, Yoon found marked reservation about returning to practice.³⁸⁵ Although some judges believed that “they were too old to make the transition” to practice, others thought that “doing so would appear unseemly.”³⁸⁶ One senior district judge declared that “he ‘did not want to prostitute [his] Article III background for dollars with the firm.’”³⁸⁷ Senior court of appeals judges responded similarly, including one who “eschewed private practice because he ‘disapprove[d] of retired judges appearing in court’ from his days as an active judge.”³⁸⁸

The only in-depth contemporary treatment of the return-to-practice question³⁸⁹ is Rotunda’s article, *The Propriety of a Judge’s Failure to Recuse When Being Considered for Another Position*.³⁹⁰ Initially prepared as a letter to then-Senate Judiciary Committee Chair Arlen Specter in anticipation of then-Judge Roberts’s Supreme Court confirmation hearing, Rotunda’s article focuses on the propriety of Roberts meeting with Bush administration officials—including the President—to discuss a potential Supreme Court nomination while Roberts was serving on the D.C. Circuit panel hearing

382. Albert Yoon, *Love’s Labor’s Lost? Judicial Tenure Among Federal Court Judges*, 91 CALIF. L. REV. 1029, 1054–55 (2003) (relying on data provided by Sheldon Goldman and cautioning that “judges’ peers on the bar have also enjoyed increased wealth in recent years,” suggestive of a “broader trend of increased wealth” among certain sectors of the legal profession); see also Sheldon Goldman et al., *W. Bush’s Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258, 273–74 & tbl.1 (2009) (noting the increased net worth of district court appointees during the last two years of George W. Bush’s presidential administration).

383. Yoon, *supra* note 382, at 1054 tbl.5, 1056. It could, of course, also suggest a potential barrier to entry into the judiciary for less wealthy practitioners. *Id.* at 1060.

384. See *supra* Part II.B.

385. Yoon, *supra* note 342, at 539.

386. *Id.*

387. *Id.*

388. *Id.* at 538.

389. See *supra* note 103 and accompanying text (noting that Van Tassel’s studies were historical in nature).

390. Rotunda, *supra* note 104. But see Stephen Gillers, David J. Luban & Steven Lubet, *Improper Advances: Talking Dream Jobs with the Judge Out of Court*, SLATE (Aug. 17, 2005), <http://www.slate.com/id/2124603> (discussing the propriety of now-Chief Justice John Roberts’s interviews with the Bush Administration about Supreme Court nomination while he was presiding over a case in which President George W. Bush was a defendant because such closed-door meetings test the public’s trust in the judiciary).

Hamdan v. Rumsfeld,³⁹¹ in which President George W. Bush was a defendant.³⁹² Rotunda's specific concern was for whether Roberts had a duty to recuse himself from the panel in *Hamdan*.³⁹³ Rotunda concluded that he did not.³⁹⁴

According to Rotunda, a judge's negotiation for post-bench employment with a law firm appearing before him or her requires disqualification, whether on a party's motion or sua sponte, but a judge's interview with executive-branch officials considering him or her for judicial elevation or other governmental appointment does not.³⁹⁵ Rotunda concluded that a judge's interview with executive-branch officials is too attenuated from the ultimate appointment to give rise to actual or apparent partiality, in part because other candidates are also being considered.³⁹⁶ Rotunda was clear, however, that a "judge[] should not be negotiating for the size of their partnership draw with a firm" while it is appearing before him or her.³⁹⁷ Instead, the judge must disqualify him- or herself.³⁹⁸

In discussing the relevant case law, Rotunda placed particular emphasis on *PepsiCo., Inc. v. McMillen*.³⁹⁹ There, Judge Richard Posner concluded that it was a violation of a trial judge's duty to avoid apparent conflicts of interest when he failed to recuse himself when a headhunting firm—acting on the judge's behalf (but contrary to the judge's instructions)—approached two firms then appearing before the judge to discuss post-bench employment opportunities.⁴⁰⁰ Posner's concern in *PepsiCo* was not for the judge pursuing

391. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 546 U.S. 1002 (2005), *rev'd* 548 U.S. 557 (2006).

392. Rotunda, *supra* note 104, at 1187–90. Rotunda's article constitutes the published version of his letter to Specter. *Id.* at 1188 & n.11.

393. *Id.* at 1189.

394. *Id.* at 1211.

395. *Id.* Rotunda rejected a so-called Jobs Recusal Rule that would require a federal judge who interviews with executive-branch officials or judicial-selection panels about a possible judicial elevation or executive-branch appointment to recuse him- or herself sua sponte from cases involving the government or members of the selection panels. *Id.* at 1199–1201, 1211.

Moreover, Rotunda noted that the commentary to the American Bar Association's *Model Code of Judicial Conduct* expressly addresses the law-firm interview scenario, but not the judicial-elevation or executive-branch-appointment issue. *Id.* at 1191.

396. *Id.* at 1196–1200.

397. *Id.* at 1211. By contrast, Rotunda reasoned that a judge's potential elevation does not involve a salary negotiation because "the salary and terms of employment are fixed. No one argues about who gets the corner office, what is the pension plan, or whether one's draw will decrease if the new partner is an insufficient rain-maker." *Id.* at 1210.

398. *Id.* at 1211.

399. *Id.* at 1209–10 & nn.92–102 (citing *PepsiCo., Inc. v. McMillen*, 764 F.2d 458, 459–61 (7th Cir. 1985)).

400. *Id.* at 460–61.

post-bench employment, but rather, for his failure to recuse himself when the law firms (as prospective employers) appeared before him in a case.⁴⁰¹

In contrast to *PepsiCo*, which featured a federal judge contemplating employment with law firms currently appearing before him, *In re CBI Holding Co.* featured a federal judge hearing a case involving a party represented by a law firm with which the judge had discussed post-bench employment several years earlier.⁴⁰² In *In re CBI Holding*, Judge Ralph K. Winter, Jr. disclosed that he had had an “extremely general” conversation with a law firm about the possibility of post-bench employment five years earlier.⁴⁰³ Several days after the conversation at issue, Judge Winter “informed the firm that [he] expected to continue serving as a federal judge” and had no subsequent contact with the firm.⁴⁰⁴ Quoting the United States Judicial Conference’s Committee on Codes of Conduct, Judge Winter observed that “[i]t is permissible for a judge who is considering leaving the bench, to explore future employment possibilities with law firms, on a private, dignified, basis.”⁴⁰⁵ Given the “very general nature” of the discussions and the “five years [that] ha[d] passed,” Judge Winter “believe[d] it [was] clear that [he was] not recused in this matter.”⁴⁰⁶ Rotunda found Judge Winter’s decision consistent with the Committee’s Opinion 84 interpreting the *Code of Conduc for U.S. Judges*.⁴⁰⁷

Lastly, several commentators have addressed the potential awkwardness of former Article III judges accepting jobs with corporations that previously

401. *Id.*; see also JAMES J. ALFINI ET AL., *supra* note 338, §§ 4-10, 4-11; RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION OF JUDGES § 9.3 (2d ed. 2007) (stating that any attempt by a judge to “curry favor” with any parties appearing before him may warrant disqualification).

402. *In re CBI Holding Co.*, 424 F.3d 265, 266 (2d Cir. 2005); see also Robert M. Howard, *I’m Sorry, Please Recuse Me Before I Hurt Myself*, 28 JUST. SYS. J. 442, 445 (2007) (discussing the facts and holding of *In Re CBI Holding Co.*).

Other cases have addressed the issue of judges negotiating for post-bench employment with firms appearing before them. See, e.g., *In re Continental Airlines Corp.*, 901 F.2d 1259, 1262–63 (5th Cir. 1990) (asserting that the trial judge should have either “rejected [a law firm employment] offer outright, or, if he seriously desired to consider accepting the offer, stood recused and vacated the rulings [in favor of the firm’s client] made shortly before the [employment] offer was made”); *Scott v. United States*, 559 A.2d 745, 756 & n.23 (D.C. 1989) (vacating appellant’s conviction on grounds that the trial judge’s negotiation for employment with a division of the Department of Justice linked to the prosecutor’s office at time of trial was analogous to a judge negotiating for employment with a private law firm).

Finally, one case noted that judges share the common experience of discussing the market for former judges to return to practice with members of the bar. See *United States v. Meyerson*, 677 F. Supp. 1309, 1312 n.1 (S.D.N.Y. 1988) (“So many judges have left the federal bench to practice law in the New York metropolitan area over the past 15 years that I doubt that there are many judges in this Circuit who have not discussed, with some member of the bar, the ‘market’ for former federal judges to return to practice.”).

403. 424 F.3d at 266.

404. *Id.*

405. *Id.* at 266–67.

406. *Id.* at 267.

407. Rotunda, *supra* note 104, at 1208 n.90.

appeared before them as parties, expressing concern for judicial self-dealing and the actuality or appearance of judicial partiality and impropriety raised by the affiliation. Van Tassel recounted one such case:

[W]hen fifty-eight-year-old Judge Royce Savage left the bench in 1961 after twenty years of service, he ran into a barrage of criticism. It did not escape public notice that he was going to work as general counsel to Gulf Oil Corporation less than two years after acquitting Gulf of criminal antitrust charges.⁴⁰⁸

Acknowledging that “[n]o one has suggested, nor is there the slightest grounds for thinking, that Judge Savage was moved by improper considerations in the antitrust case; and there is no law against his now going to work for Gulf,” a *New York Times* editorial published at the time concluded that Savage nevertheless “showed poor judgment in doing so, because his action tends to lessen public confidence in the independence and integrity of the Federal Judiciary.”⁴⁰⁹

In sum, former Article III judges should be prohibited from returning to practice as lawyers and legal consultants because both raise concerns for actual or apparent self-dealing and conflicts of interest, which in turn implicate judicial independence, impartiality, and integrity. Together, these risk loss of trust and confidence in the courts, as the *New York Times* editorial highlighted at the time of Judge Savage’s resignation.⁴¹⁰ A prohibition on return to practice should apply irrespective of whether the judge resigned or retired from the bench. Moreover, the prohibition should apply to practice in both the public and private sectors because a former judge’s return to practice in either setting raises concern for actual or apparent effects on judicial independence. Thus, a judge who returns to practice as Solicitor General or Attorney General raises actual or apparent concerns for a conflict of interest, just as does a return to practice at a firm.

I do not propose extending the prohibition to service as a neutral arbitrator or mediator because these roles do not present the same potential for actual or apparent partiality or compromise of independence or integrity as does representing parties and interests. Nevertheless, work as a neutral arbitrator or mediator does appear to “trade in on” the status and experience of being a

408. Van Tassel, *Resignations and Removals*, *supra* note 103, at 363. Indeed, Van Tassel quoted President John F. Kennedy, who, in response to Judge Savage’s resignation, observed:

[T]he reason that [judges] are appointed for life is so that there can . . . be no actual improprieties [and] no appearance of impropriety . . . I don’t think anyone should accept a Federal judgeship unless prepared to fill it for life because I think the maintenance of the integrity of the Judiciary is so important.

Id. at 363–64 (citing DAVID STEIN, *JUDGING THE JUDGES* 8–9 (1974)) (alterations and omissions in original).

409. Editorial, *The Judiciary’s Commitment*, N.Y. TIMES, Oct. 25, 1961, at 36, *quoted in* Van Tassel, *Resignations and Removals*, *supra* note 103, at 363–64.

410. See *supra* note 409 and accompanying text.

federal judge. Substantial numbers of 1993–2010 resignees and retirees became neutral arbitrators or mediators post-bench, including with such organizations as JAMS or FedArb.⁴¹¹ Although such work raises concerns for profiting from federal judicial service, there are other post-bench activities, like legal teaching or writing, that also arguably profit from prior federal judicial service, and this Article does not propose prohibiting them (though work as a clinical law professor would fall within the prohibition against return to practice).

A prohibition on former Article III judges' return to practice would eliminate or, at a minimum, mitigate concern that currently serving judges use their positions to curry favor with prospective employers—a concern that has both actual and apparent dimensions. So long as judges are actually prohibited from returning to practice, and the legal profession, parties, and public understand that prohibition, judges' independence, integrity, and impartiality are less likely to be questioned by the public and participants, and trust and confidence in the courts can be preserved.

Likewise, a prohibition on return to practice would prevent the awkwardness (and potential impartiality concerns) presented when a former judge appears in court, which gives the former judge-as-advocate actual or apparent undue influence over the proceedings. This concern was noted in the U.K. Bar Council's response to the British government's 2006 effort to lift the convention,⁴¹² and in response to Yoon's survey, highlighted earlier.⁴¹³ Beyond that lies concern, as in England and Wales, for actual or apparent conflicts of interest arising from former judges receiving judicial pensions while appearing as advocates before the bench.

A return-to-practice prohibition could be implemented in a number of ways, including: (a) the Judicial Conference could amend Canon 3 of the *Code of Conduct for U.S. Judges* to prohibit Article III judges from returning to law practice or legal consulting following their service on the bench; (b) the American Bar Association could amend the *ABA Model Rules of Professional Conduct* (and state legal professional codes based on the *Model Rules*) to prohibit former Article III judges from practicing law or engaging in legal consultation and/or (c) Congress could enact a statute denying a pension to any Article III judge who returns to practice. Alternatives (a) through (c) are not mutually exclusive, but could be implemented simultaneously. Alternative (a) is offered with recognition that the *Code* is not binding on currently serving or former judges⁴¹⁴ with the result that this alternative constitutes the least constraining, and enforceable, form of the prohibition. Alternative (b) builds on the *Code*'s observation that former Article III judges' return to practice is a

411. See *infra* app. B.

412. BAR COUNCIL RESPONSE, *supra* note 286, at 3 (underscoring particularly grave justice concerns raised by a former judge appearing as a prosecutor in a criminal matter).

413. See *supra* notes 385–88 and accompanying text.

414. See *supra* note 239.

matter for state, rather than federal, regulation and, accordingly, depends on state enforcement. Alternative (c) likely constitutes the strongest form of the prohibition, although I recognize that a former judge, faced with a choice between receiving a law firm or corporate salary, on the one hand, and a federal judicial pension, on the other, may well choose the former.

Development or further fostering of an informal professional norm against return to practice—with Yoon’s study showing that some judges have already expressed sentiments of this kind⁴¹⁵—might be at least as important as alternatives (a) through (c). Such a norm has apparently prevailed in England and Wales for decades and been enforced there primarily through reputational mechanisms, such as peer pressure and shaming by the Lord Chancellor’s office or in the press.⁴¹⁶ Although effective in prohibiting the outright return to practice,⁴¹⁷ this last mechanism has not been successful in staving off the growing phenomenon of former judges serving as legal consultants in England and Wales.⁴¹⁸ Service as a legal consultant should also fall within the norm against return to practice for the Article III judiciary. This norm could be articulated in the first instance by the Chief Justice or JCUS and reinforced by the Chief Justice, JCUS, or press reports.

The proposed prohibition on return to practice is partially analogous to the Ethics Reform Act’s prohibition of former government employees working on matters outside of government service that they previously worked on while serving in the executive or legislative branches.⁴¹⁹ They are partially analogous because the prohibition proposed in this Article is not time-limited, as some provisions in the Ethics Act are;⁴²⁰ does not carry criminal sanctions,

415. See *supra* notes 385–88 and accompanying text.

416. See *supra* Part II.D.

417. See *supra* Part II.D.

418. See *supra* note 242 and accompanying text.

419. See Ethics Reform Act of 1989, Pub. L. No. 101-104, § 101, 103 Stat. 1716, 1716–1724 (codified as amended at 18 U.S.C. § 207 (2006)); see also Kathleen Clark, *Regulating the Conflict of Interest of Government Officials*, in CONFLICT OF INTEREST IN THE PROFESSIONS 49, 57–58 (Michael Davis & Andrew Stark eds., 2001) (discussing the “revolving door between public and private sectors” and reformers’ corresponding concerns about the potential for corruption (internal quotation marks omitted)).

420. The most closely analogous post-employment restrictions under the Ethics Reform Act include those set forth in section 101. See § 101, 103 Stat. at 1716–17. Section 101 of the Act amends the language of 18 U.S.C. § 207(a)(1) and contains permanent restrictions on executive-branch officials or employees “knowingly mak[ing], with the intent to influence, any communication or appearances before” any currently serving U.S. government official or employee “on behalf of any other person . . . in connection with a particular matter in which the United States is a party or has a direct and substantial interest,” the former government employee “participated personally and substantially,” and “which involved a specific party . . . at the time of such participation.” § 101, 103 Stat. at 1716.

Section 101 of the Ethics Reform Act also amends 18 U.S.C. § 207(a)(2) and provides for a two-year post-government-employment restriction for executive-branch officials or employees from “knowingly mak[ing], with the intent to influence, any communication[s] to or

as provided for in the Ethics Act,⁴²¹ and is not limited to work on certain issues, as is the Ethics Act.⁴²² Rather, the return-to-practice prohibition proposed here is permanent and all-encompassing vis-à-vis law practice and legal consulting and anticipates enforcement through civil statutes (denying pension benefits), conduct-code amendments, or changes in professional norms. A compromise position could be a two- to five-year mandatory cooling-off period between leaving the bench and entering law practice or legal consulting. This compromise mirrors the waiting periods proposed by the British government and the Judges' Council at the time of the government's effort to lift the convention against return to practice.⁴²³ Such an approach would also draw on the Ethics Reform Act's approach to post-employment restrictions for former government employees and officials.⁴²⁴ A temporary prohibition would address concerns for judges' actual or apparent self-dealing (to promote future employment prospects) in the short term, but it would not

appearance[s] before" any currently serving U.S. government official or employee "on behalf of any other person . . . in connection with a particular matter in which the United States . . . is a party or has a direct and substantial interest," the matter fell within the former government employee's official responsibilities "within a period of one year before the termination of his or her [government] service," and the matter involved a specific party "at the time it was so pending." § 101, 103 Stat. at 1716–17.

Other post-employment restrictions on former executive-branch officials or employees set forth in the Ethics Reform Act include amendments to 18 U.S.C. § 207(b), a one-year restriction on aiding or advising on trade or treaty negotiations; 18 U.S.C. § 207(c), a one-year restriction on certain senior personnel; and 18 U.S.C. § 207(d), restrictions on very senior personnel. *See* § 101, 103 Stat. at 1717–19. Finally, the Ethics Reform Act also places post-employment restrictions on members of Congress and other legislative branch employees and officials, codified at 18 U.S.C. § 207(e). § 101, 103 Stat. at 1719–20.

421. § 407, 103 Stat. at 1753–54.

422. § 101, 103 Stat. at 1719–24 (limiting applicability to matters worked on while employed). Many states' rules of professional responsibility include a provision preventing lawyers from working on matters outside of the government that they were personally and substantially involved in while serving as lawyers for the government. *See, e.g.*, D.C. RULES OF PROF'L CONDUCT R. 1.11 (2007); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.11 (2009) (allowing former government lawyer to work on matters in which he or she was personally and substantially involved only if former government-agency employer provides informed consent in writing).

Concerns animating the former-government-lawyer rule include the possibility of undue influence by the former government lawyer over current government officials and concern for use of confidential information that the lawyer previously had access to while working for the government. *See, e.g.*, Robert Vaughn, *The Role of Statutory Regulation of Public Service Ethics in Great Britain and the United States*, 4 HASTINGS INT'L & COMP. L. REV. 341, 366 (1980-81) (highlighting similar concerns governing English and Welsh solicitors vis-à-vis protection of former clients).

The return-to-practice prohibition proposed here would go beyond the terms of states' ethics rules for former government lawyers by prohibiting all legal practice and consulting, not merely those matters with which the former judge was involved while serving in the Article III judiciary.

423. *See supra* note 280 and accompanying text.

424. *See supra* notes 419–22 and accompanying text.

address the larger concerns for negative effects on impartiality, integrity, and independence raised by former judges returning to practice.

Although a prohibition on return to practice might have serious consequences for individuals named to Article III judgeships at young ages who subsequently discover that they are not well-suited for the bench, this consequence and its possible deterrent effect on judicial service for younger lawyers is not a sufficient reason to reject a prohibition on return to practice, given the concerns for judicial independence, impartiality, and integrity that are at stake. That the prohibition on return to practice might cause lawyers to delay judicial service to gain more practical experience or save more money is not a bad thing. Indeed, having judges begin their service at older ages with greater knowledge and experience would be beneficial, as long as conduct and disability protections were in place to safeguard against age-related or other competence issues.

IV. CONCLUSION

As for how the tenure and return-to-practice recommendations intersect, some commentators may suggest that a prohibition on return to practice runs counter to encouraging voluntary judicial retirement through increased pension benefits and improved retirement status because one obvious post-retirement activity is the return to practice. To the contrary, the recommendations to improve retirement conditions (Part III(A)) and prohibit return to practice (Part III(B)) work in concert because increased pension benefits and improved retirement status provide an attractive alternative to return to practice by recognizing and rewarding the public service commitment of Article III judges. By guaranteeing retired judges regular pension increases and providing opportunities for useful work in judicial administration, the reform proposals redress, at least for some, the desire to return to practice. That said, pension and retirement status reform will not compensate for much of the lost income potential of former judges interested in returning to practice, especially private practice. Still, the real and apparent threats to judicial independence, impartiality, and integrity presented by Article III judges returning to practice outweigh concern for former judges' access to lucrative law-practice opportunities.

Finally, to the extent that judges resign or retire early to return to practice out of frustration over low judicial pay, this phenomenon should be addressed directly through increased judicial appropriations (specifically increased judicial pay) and not merely indirectly by allowing significant numbers of judges to leave the bench to return to practice.⁴²⁵ Today's federal judges are

425. See, e.g., Thomas D. Morgan, *The Quest for Equality in Regulating the Behavior of Government Officials: The Case of Extrajudicial Compensation*, 58 GEO. WASH. L. REV. 488, 500 (1990) ("Although some judges in recent years have returned to practice, primarily because of the larger financial rewards available there, that is clearly not the direction in which the

underpaid and overworked.⁴²⁶ Federal judicial salaries have shrunk substantially as compared with compensation for other legal professionals in private practice and even academia.⁴²⁷ Congress must act to redress shortfalls in judicial pay in order to stem the tide of former judges returning to practice.

country should move. Judges should be encouraged to serve until retirement, and a system that makes such service excessively difficult is a system that should be changed.”).

426. See, e.g., SUPREME COURT OF THE UNITED STATES, [CHIEF JUSTICE’S] 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (Dec. 10, 2010), available at <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>; *Federal Court Management Statistics*, U.S. CTS., <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx> (last visited Aug. 1, 2011) (reflecting increasing workload per judge); see also Yoon, *supra* note 382, at 1031 (“Federal judges now hear more cases annually on average than they did ten years ago, and their annual salaries adjusted for inflation have steadily declined over that period.” (footnote omitted)); cf. William Glaberson, *Unusual Turnover in New York Judges as Salaries Lag*, N.Y. TIMES, July 5, 2011, at A1 (reporting on low pay for the New York judiciary, leading to increased judicial attrition, specifically to large law firms).

427. See, e.g., Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140, 145–49 (Jan.-Feb. 2010); RUSSELL WHEELER, *THE CHANGING FACE OF THE FEDERAL JUDICIARY* 6–10 (Aug. 2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/08_federal_judiciary_wheeler/08_federal_judiciary_wheeler.pdf.

APPENDIX A

FORMER ARTICLE III JUDGES (1789–1992) LISTED IN THE FJC REPORT: JUDGES IDENTIFIED AS HAVING “RESIGNED” WHO RETURNED TO PRACTICE AT SOME POINT FOLLOWING RESIGNATION⁴²⁸

In order to compare the return-to-practice rate for Article III judges resigning between 1789 and 1992 with those resigning between 1993 and 2010, I examined Van Tassel et al.’s “Appendix: Judges Identified as Having Resigned” in *Why Judges Resign* to determine who among the former judges listed there had returned to practice at some point following resignation. As noted in the text, I defined “practice” as serving as a lawyer or lawyer-consultant in the public or private sectors and not as a neutral arbitrator or mediator. I relied on the information provided in the appendix and did not attempt to uncover other information about resigning Article III judges eventually returning to practice. As a result, my calculations may well underestimate the proportion of judges returning to practice between 1789 and 1992.

What follows is a list of the ninety-six Article III judges who Van Tassel, Wirtz, and Wonders designated as resigning between 1789 and 1992 for reasons other than age or health, who later returned to practice. Practice affiliations are noted if available. Those marked with an asterisk (*) resigned from Article III service because of loyalty to the Confederacy and later returned to practice.

Angell, Alexis C.	private practice
Batts, Robert L.	General Counsel, Gulf Oil Corp.; private practice
Bauman, Arnold	Shearman & Sterling
Bell, Griffin B.	King & Spalding; U.S. Attorney General
Biddle, Francis	U.S. Solicitor General
Blodgett, Henry	Counsel for the U.S., Bering Sea Arbitration
Bonner, Robert C.	Administrator, U.S. Justice Department’s Drug Enforcement Administration
Byrnes, James F.	Hogan & Hartson
Campbell, John A.*	private practice
Campbell, Ralph	Head of Legal Department, Cosden & Co.

428. FJC REPORT, *supra* note 103, at 53–122. I am indebted to the substantial research amassed in Van Tassel, Wirtz, and Wonders’s appendix to their FJC report, which sets forth detailed information on each judge designated as having resigned between 1789 and 1992 including court(s) served on, commission date, termination date and reason, and post-bench activities, with sources cited. *See id.*

Carpenter, George A.	Tenney, Sherman, Rogers & Guthrie
Chipman, Nathaniel	private practice
Combs, Bertram T.	Wyarr, Tarrant & Combs
Covington, James H.	Covington, Burling, Rublee, Acheson & Shorb
Cowan, Finis E.	Baker & Botts
Crowley, John P.	Cotsirilos, Stephenson, Tighe & Streicker
Curtis, Benjamin R.	private practice
Dawson, Charles I.	private practice
Day, William L.	Squire, Sanders & Dempsey
DeVries, Marion	private practice
Denison, Arthur	Baker, Hostetler & Patterson
Dick, Robert P.*	private practice ⁴²⁹
Donworth, George	Donworth & Todd
Duell, Charles H.	Duell, Warfield & Duell
Duncan, Robert M.	Jones, Day, Reavis & Pogue
Dyer, Charles E.	Counsel, Northwestern Mutual Life Insurance Co.
Fisher, George P.	U.S. Attorney for the District of Columbia
Fogel, Herbert A.	Bartel & Fogel
Fortas, Abe	private practice
Frankel, Marvin E.	Kramer, Levin, Nessen, Kamin & Frankel
Garvin, Edwin L.	Lewis, Garvin & Kelsey
Getzendanner, Susan	Skadden, Arps, Slate, Meagher & Flom
Haight, Thomas G.	Wall, Haight, Carey & Hartpence
Henning, Edward J.	General Counsel, General Order of Moose; counsel for motion picture interests
Hermansdorfer, Howard D.	Barnett & Alagia; Hermansdorfer & Coburn
Higby, Lynn C.	Sale & Bryant
Hoehling, Adolph A., Jr.	Hoehling, Peelle & Ogilby
Howe, James H.	private practice
Hughes, James	private practice
Kennedy, Harold M.	Burlingham, Veeder, Clark & Hupper
Lane, Arthur S.	General Counsel, Johnson & Johnson
Letts, Ira L.	Curtis, Matteson, Boss & Letts
Lewis, William	private practice
Lowell, John	private practice

429. According to Van Tassel, Wirtz, and Wonders, Judge Dick was initially forced to resign due to his association with the Confederacy, precipitating a brief return to private practice. Several years later, he was reappointed to the bench and served for an extended period, before his failing health required him to resign a second time.

Lynch, Charles F.	private practice
Marshall, John A.	Howat, Marshall, MacMillan & Nebeker
Masterson, Thomas	Morgan, Lewis & Bockius
Mayer, Julius	Mayer, Warfield & Watson
McCrary, George W.	General Counsel, Atchison, Topeka & Santa Fe Railroad
McCree, Wade H., Jr.	U.S. Solicitor General
McDonald, Gabrielle K.	private practice
McGranery, James P.	U.S. Attorney General
McLellan, Hugh D.	Herrick, Smith, Donald, Farley & Ketchum
Meanor, H. Curtis	Podvey, Sachs, Meanor, Catenacci, Hildner & Coccoziello
Middlebrooks, David L., Jr.	Levin, Warfield, Middlebrooks, Graff, Mabie, Rosenbloum & Magie
Monroe, Thomas B.*	private practice
Montgomery, Martin V.	Montgomery & Montgomery
Morris, Hugh M.	Morris, Nichols, Arsht & Tunnell
Morris, Joseph W.	Senior Counsel, Shell Oil
Mulligan, William H.	Skadden, Arps, Slate, Meagher & Flom
Nicoll, John C.*	District Attorney, Georgia
Noyes, Walter	General Counsel, Delaware & Hudson Co.
O'Connor, Robert, Jr.	O'Connor & Adler
Peck, John W.	Peck, Schaffer & Williams
Phillips, Layn R.	Irell & Manella
Priest, Henry S.	Boyle, Priest & Lehman
Ramirez, Raul A.	Orrick, Herrington & Sutcliffe
Rasch, Carl L.	private practice
Reed, James H.	Knox & Reed
Reed, John A., Jr.	Lowndes, Drosdick, Doster & Reed
Renfrew, Charles B.	U.S. Deputy Attorney General
Rifkind, Simon H.	Paul, Weiss, Rifkind, Wharton & Garrison
Saunders, Eugene D.	Saunders, DuFour & DuFour
Savage, Royce H.	General Counsel, Gulf Oil Corp.; Boone, Smith, Davis & Minter
Scalera, Ralph F.	Thorp, Reed & Armstrong
Scarburgh, George P.*	private practice
Scott, Thomas E.	Steel, Hector & Davis
Shannon, Fred	Shannon & Weidenbach
Shipman, William D.	Barlow, Shipman & MacFarland
Smith, Sidney O., Jr.	Alston, Miller & Gaines
Sneed, Emory M.	McNair Law Firm

Sofaer, Abraham	Legal Advisor, U.S. Department of State
Starr, Kenneth W.	U.S. Solicitor General
Stern, Herbert J.	Hellring, Lindeman, Goldstein, Siegal & Greenberg
Thacher, Thomas D.	U.S. Solicitor General
Tone, Phillip W.	trial lawyer
Travia, Anthony J.	private practice
Troup, Robert	private practice
Tyler, Harold R., Jr.	U.S. Deputy Attorney General
Veeder, Van Vechten	Burlingham, Veeder, Clark & Hupper
Walker, Thomas G.	Counsel, New Jersey Bell Telephone Co.
Walsh, Lawrence E.	U.S. Deputy Assistant Attorney General;
	Davis, Polk & Wardwell; Crowe & Dunlevy
Webster, William H.	Milbank, Tweed, Hadley & McClay
Wing, Francis J.	private practice
Winslow, Francis A.	private practice
Wright, Daniel T.	private practice

APPENDIX B

ARTICLE III JUDGES WHO RESIGNED OR RETIRED BETWEEN JANUARY 1, 1993 AND DECEMBER 31, 2010 AND RETURNED TO PRACTICE

*Overall finding: 58 out of 123 resignees and retirees returned to practice
(47.15%)*

A word on methodology: I used the Federal Judicial Center's (FJC) judicial biographical database, www.fjc.gov/history/home.nsf/page/judges.html, to search by (1) date of termination of federal judicial service (between January 1, 1993 and December 31, 2010 in order to complement Van Tassel's study of judges leaving the bench between 1789 and 1992) *and* (2) method of termination of federal judicial service—i.e., “resignation,” “retirement,” or “retirement on disability.” The first search, specifying the method of termination as “resignation” for the study period 1993 to 2010, yielded thirty-two former Article III judges (Table 1). The second search, specifying termination by “retirement” for the same date range, yielded ninety-one former Article III judges (Table 2), and the third search, specifying termination by “retirement on disability” for the same date range, yielded no former Article III judges. Accordingly, I did not prepare a table to reflect the results of this third search.

Once the lists of former Article III judges who had resigned and retired during the study period were generated, I searched publicly available, including online, sources for each former judge to determine whether he or she had returned to practice at some point following termination of his or her federal judicial service. I did not limit my searches to those who returned to practice immediately upon stepping down from the bench, but, rather, to those who practiced at some point after resigning or retiring. The publicly available sources I accessed included law firm websites, newspapers, Martindale Hubbell, and others.

“Practice” as used in this study and in my proposed prohibition on return to practice includes practice on behalf of public or private entities and includes work as a lawyer or lawyer-consultant. What is not included in this definition of practice is work as a neutral arbitrator or mediator.

As noted above, the tables may understate the return-to-practice rates because there were former judges for whom I could not find reliable information about whether they had returned to practice. In these cases, I erred on the side of not listing them as returning to practice so as to avoid overstating the rate.

I welcome any questions or comments on, including corrections, to this data.

TABLE 1

ARTICLE III JUDGES WHO RESIGNED BETWEEN JANUARY 1, 1993 AND
DECEMBER 31, 2010 AND RETURNED TO PRACTICE*Resignees: 21 of 32 resignees returned to practice (65.63%)*

Burrage, Billy Michael	returned to practice ⁴³⁰
Buttram, H. Dean, Jr.	returned to practice ⁴³¹
Cassell, Paul G.	returned to practice ⁴³²
Caulfield, Barbara A.	returned to practice ⁴³³
Chertoff, Michael	returned to practice ⁴³⁴
Cindrich, Robert J.	returned to practice ⁴³⁵
Coar, David H.	
Collins, Robert F.	
Conboy, Kenneth	returned to practice ⁴³⁶
Filip, Mark R.	returned to practice ⁴³⁷
Freeh, Louis J.	returned to practice ⁴³⁸
Henry, Robert H.	
Holmes, Sven Erik	returned to practice ⁴³⁹

430. *Michael Burrage*, WHITTEN BURRAGE, <http://whittenburrage.1mobbb.com/1288751861.php> (last visited Sept. 30, 2011).

431. *Attorneys: H. Dean Buttram, Jr.*, BUTTRAM, HAWKINS & HOPPER, LLC, <http://www.buttramhawkinshopperllc.com/FirmInfo/Lawyers/21393.aspx> (last visited Sept. 16, 2011).

432. *Paul G. Cassell, Special Counsel*, HATCH, JAMES, & DODGE, <http://www.hjdlaw.com/attorneys/paul-cassell/> (last visited Sept. 30, 2011) (indicating that now-Professor Cassell maintains a consulting practice with Hatch, James, & Dodge).

433. Bob Egelko, *Barbara Caulfield, Attorney, Federal Judge, Dies*, SFGATE.COM, http://articles.sfgate.com/2010-11-19/bay-area/24839882_1_judge-caulfield-extradition-case-jimmy-smyth (last visited Sept. 16, 2011); see also *In Memoriam: Barbara Caulfield*, KAYE SCHOLER (Nov. 9, 2010), http://www.kayescholer.com/news/firm_news/20101109.

434. *Biographies: Michael Chertoff*, COVINGTON & BURLING, LLP, <http://www.cov.com/mchertoff/> (last visited Sept. 16, 2011).

435. *Media Relations, Experts: Robert J. Cindrich*, UPMC, http://www.upmc.com/media_relations/experts/pages/experts.aspx?expertid=50 (last visited Sept. 16, 2011).

436. *Attorneys: Kenneth Conboy*, LATHAM & WATKINS, LLP, <http://www.lw.com/Attorneys.aspx?page=AttorneyBio&attno=00128> (last visited Sept. 16, 2011).

437. *Lawyers: Mark Filip*, KIRKLAND & ELLIS, LLP, <http://www.kirkland.com/sitecontent.cfm?contentID=220&itemID=9711> (last visited Sept. 16, 2011).

438. *Our People: Louis J. Freeh*, FREEH SPORKIN SULLIVAN, <http://www.freehsporkin.sullivan.com/> (last visited Sept. 16, 2011).

439. *Establishing and Maintaining the Right Relationship Between the General Counsel and the Chief Compliance Officer: Perspectives of Sven Erik Holmes, Vice Chair, Legal and Compliance for KPMG LLP*, ASS'N CORP. COUNS., <http://newsmanager.commpartners.com/acca/exec/downloads/CLO-Perspective-Judge-Holmes.pdf> (last visited Sept. 16, 2011).

Jenkins, Martin J.	
Kelley, Walter DeKalb, Jr.	returned to practice ⁴⁴⁰
Kendall, [Elton] Joe	returned to practice ⁴⁴¹
Kent, Samuel B.	
Larson, Stephen G.	returned to practice ⁴⁴²
Lechner, Alfred J., Jr.	returned to practice ⁴⁴³
Levi, David F.	
Lewis, Timothy K.	returned to practice ⁴⁴⁴
Luttig, J. Michael	returned to practice ⁴⁴⁵
Manella, Nora Margaret	
McConnell, Michael W.	
McKelvie, Roderick R.	returned to practice ⁴⁴⁶
Moreno, Carlos R.	
Nottingham, Edward W., Jr.	returned to practice ⁴⁴⁷
Orlofsky, Stephen M.	returned to practice ⁴⁴⁸
Robinson, Stephen C.	returned to practice ⁴⁴⁹
Sandoval, Brian E.	
Schiavelli, George P.	returned to practice ⁴⁵⁰
Scott, Jeanne E.	

440. *People: Walter D. Kelley Jr.*, JONES DAY, <http://jonesday.com/wdkelley/> (last visited Sept. 16, 2011).

441. *Attorneys: Joe Kendall*, KENDALL LAW GROUP, LLP, <http://www.kendalllawgroup.com/attorneys/joe-kendall/> (last visited Sept. 16, 2011).

442. *People: Stephen G. Larson*, ARENT FOX, <http://www.arentfox.com/people/index.cfm?fa=profile&id=591> (last visited Sept. 16, 2011).

443. *People: Alfred J. Lechner Jr.*, WHITE & CASE, LLP, <http://www.whitecase.com/Attorneys/Detail.aspx?attorney=3562> (last visited Sept. 16, 2011).

444. *Professionals: Hon. Timothy K. Lewis*, SCHNADER HARRISON SEGAL & LEWIS, LLP, <http://www.schnader.com/professionals/xprProfessionalDetailsSchnader.aspx?xpST=ProfessionalDetail&professional=142> (last visited Sept. 16, 2011).

445. *About Us, Executive Biographies: J. Michael Luttig*, BOEING COMPANY, <http://www.boeing.com/companyoffices/aboutus/execprofiles/luttig.html> (last visited Sept. 16, 2011).

446. *Biographies: Roderick R. McKelvie*, COVINGTON & BURLING, LLP, <http://www.cov.com/rmckelvie/> (last visited Sept. 16, 2011).

447. *Attorneys: Edward W. Nottingham Jr.*, EDWARD W. NOTTINGHAM, LLP, <http://www.nottinghamlaw-mediation.com/Attorneys/Edward-Nottingham.shtml> (last visited Sept. 16, 2011).

448. *People, Professionals: Stephen M. Orlofsky*, BLANK ROME, LLP, <http://www.blankrome.com/index.cfm?contentID=10&bioID=1358> (last visited Sept. 16, 2011).

449. *Professionals: Stephen C. Robinson*, SKADDEN, ARPS, SLATE, MEAGHER, & FLOMM, LLP, <http://www.skadden.com/index.cfm?contentID=45&bioID=9898> (last visited Sept. 16, 2011).

450. *Our Attorneys: Hon. George P. Schiavelli*, BROWN, WHITE & NEWHOUSE, LLP, <http://www.brownwhitelaw.com/attorneys/gschiaivelli.html> (last visited Sept. 16, 2011).

TABLE 2

ARTICLE III JUDGES WHO RETIRED PURSUANT TO 28 U.S.C. § 371(A) BETWEEN
JANUARY 1, 1993 AND DECEMBER 31, 2010 AND RETURNED TO PRACTICE*Retirees: 37 out of 91 retirees returned to practice (40.66%)*

Aguilar, Robert P.	
Andersen, Wayne R.	
Baird, Lourdes G.	
Bassler, William G.	
Bechtle, Louis C.	returned to practice ⁴⁵¹
Birch, Stanley F., Jr.	
Bissell, John W.	returned to practice ⁴⁵²
Brett, Thomas R.	
Brooks, Gene Edward	
Brown, Bailey	
Bullock, Frank W., Jr.	returned to practice ⁴⁵³
Cahn, Edward N.	returned to practice ⁴⁵⁴
Cambridge, William G.	
Camp, Jack T., Jr.	
Carrigan, James R.	
Clark, Russell G.	
Clemon, U.W.	returned to practice ⁴⁵⁵
Davies, John G.	
Davis, Edward B.	returned to practice ⁴⁵⁶
Echols, Robert L.	returned to practice ⁴⁵⁷
Elliott, J. Robert	

451. *Attorney Bios: Louis C. Bechtle*, CONRAD O' BRIEN PC, <http://www.conradobrien.com/Attorney-Bios/Louis-C-Bechtle/30/> (last visited Sept. 14, 2011).

452. *Attorney Bios: John W. Bissell*, CONNELL FOLEY, http://www.connellfoley.com/attorneys/bissell_j.html (last visited Sept. 14, 2011).

453. *Lawyer Bio: Frank W. Bullock, Jr.*, WOMBLE CARLYLE, <http://www.wcsr.com/lawyers/frank-bullock> (last visited Sept. 14, 2011).

454. *People: Edward N. Cahn*, BLANK ROME, LLP, <http://www.blankrome.com/index.cfm?contentID=10&bioID=2010> (last visited Sept. 14, 2011).

455. *Attorney Profiles: U.W. Clemon*, WHITE ARNOLD & DOWD PC, <http://www.whitearnolddowd.com/attorneys/u-w-clemon.html> (last visited Sept. 14, 2011).

456. *In the Media: Statement from Andrew Smulian Regarding the Passing of Judge Edward B. Davis*, AKERMAN (May 25, 2010), <http://www.akerman.com/documents/res.asp?id=872>.

457. *Attorneys: Robert L. Echols*, BASS BERRY SIMS PLC, <http://www.bassberry.com/rechols/> (last visited Sept. 14, 2011).

Farnan, Joseph J., Jr.	returned to practice ⁴⁵⁸
Finesilver, Sherman Glenn	returned to practice ⁴⁵⁹
Gibson, Benjamin F.	
Gierbolini-Ortiz, Gilberto	
Giles, James Tyrone	returned to practice ⁴⁶⁰
Hackett, Barbara K.	
Hagen, David W.	
Harris, Stanley S.	
Hatchett, Joseph W.	returned to practice ⁴⁶¹
Heaney, Gerald W.	
Higginbotham, A. Leon, Jr.	returned to practice ⁴⁶²
Hillman, Douglas W.	
Ideman, James M.	
Jackson, Thomas Penfield	returned to practice ⁴⁶³
Johnson, Norma Holloway	
Jones, Nathaniel R.	returned to practice ⁴⁶⁴
Kauffman, Bruce W.	returned to practice ⁴⁶⁵
Keeton, Robert E.	
Kelly, Patrick F.	
Kenyon, David V.	
La Plata, George	returned to practice ⁴⁶⁶
Laffitte, Hector M.	returned to practice ⁴⁶⁷

458. *Attorneys: Joseph J. Farnan, Jr.*, FARNAN LLP, <http://www.farnanlaw.com/Joe-Farnan-Bio.html> (last visited Sept. 14, 2011).

459. *Court History, 1992-2008 History: The District of Colorado*, TENTH JUD. CIRCUIT HIST. SOC'Y, <http://www.10thcircuithistory.org/pdfs/1992-2008History/Colorado%20district%20court%20chapter--Final%20edit.pdf> (last visited Sept. 14, 2011) (indicating Judge Finesilver passed away in 2006, after serving for nine years as special counsel with Popham Haik Schnobrich & Kaufman).

460. *Our People: James T. Giles*, PEPPER HAMILTON LLP, http://www.pepperlaw.com/LegalStaff_Preview.aspx?LegalStaffKey=489 (last visited Sept. 14, 2011).

461. *Biographies: Joseph W. Hatchett*, AKERMAN, <http://www.akerman.com/bios/bio.asp?id=296&name=Hatchett> (last visited Sept. 14, 2011).

462. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Aloyisus Leon Higginbotham, Jr.*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1039&cid=999&ctype=na&inststate=na> (last visited Sept. 14, 2011).

463. *Attorneys: Thomas Penfield Jackson*, JACKSON & CAMPBELL, <http://www.jacks-camp.com/profile.asp?data=24> (last visited Sept. 14, 2011).

464. *People: Nathaniel R. Jones*, BLANK ROME, LLP, <http://www.blankrome.com/index.cfm?contentID=10&bioID=2251> (last visited Sept. 14, 2011).

465. *Our Attorneys: Honorable Bruce W. Kauffman*, ELLIOTT GREENLEAF, <http://www.elliottgreenleaf.com/bwk.html> (last visited Sept. 14, 2011).

466. See GEORGE LA PLATA, FROM THE BARRIO TO THE BENCH 218–20 (2008).

Lambros, Thomas D.	returned to practice ⁴⁶⁸
Legge, Charles A.	
Lifland, John C.	
Limbaugh, Stephen N.	returned to practice ⁴⁶⁹
Little, F.A., Jr.	returned to practice ⁴⁷⁰
Livaudais, Marcel, Jr.	
Logan, James K.	returned to practice ⁴⁷¹
Loughlin, Martin F.	
Lynch, Eugene F.	
MacKenzie, John A.	
Marshall, Prentice H.	returned to practice ⁴⁷²
Martin, John S., Jr.	returned to practice ⁴⁷³
Matia, Paul R.	returned to practice ⁴⁷⁴
Mentz, Henry A., Jr.	
Merhige, Robert R., Jr.	returned to practice ⁴⁷⁵
Michel, Paul R.	
Mikva, Abner J.	returned to practice ⁴⁷⁶
Mukasey, Michael B.	returned to practice ⁴⁷⁷
Nevas, Alan H.	
Norris, William A.	returned to practice ⁴⁷⁸

467. *Attorneys: Héctor M. Laffitte*, MCCONNELL VALDÉS LLC, <http://www.mcvpr.com/Bio/HectorLaffitte.asp> (last visited Sept. 16, 2011).

468. *Attorneys: Thomas D. Lambros*, JANIK LLP, <http://janiklaw.com/attorneys-lambros.html> (last visited Sept. 16, 2011).

469. *People: Stephen N. Limbaugh, Sr.*, ARMSTRONG TEASDALE, www.armstrongteasdale.com (last visited Sept. 16, 2011).

470. *F.A. Little, Jr.*, STANLEY, REUTER, ROSS, THORNTON & ALFORD, <http://www.sfrlawfirm.com/little.htm> (last visited Sept. 16, 2011).

471. *Foulston Attorneys: James K. Logan*, FOUSTON SIEKFIN LLP, <http://www.foulston.com/attorneys/detail.cfm?id=361> (last visited Sept. 16, 2011).

472. *Attorneys: Prentice Marshall (deceased)*, COTSIROLOS, TIGHE & STREICKER, LLP, <http://www.cotsiriloslalaw.com/attorneys/index.php> (last visited Sept. 16, 2011).

473. *John Martin*, MARTIN & OBERMAIER, LLC, <http://www.martinobermaierlaw.com/martin.html> (last visited Oct. 1, 2011).

474. *People: Paul R. Matia*, PORTER WRIGHT, http://www.porterwright.com/paul_matia/ (last visited Sept. 16, 2011).

475. Patricia Sullivan, *Federal Judge Robert R. Merhige Dies*, WASH. POST, Feb. 20, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A38599-2005Feb19.html> (reporting in Judge Merhige's obituary that he joined Hunton & Williams after leaving the bench).

476. Robin I. Mordfin, *Mikva Retires from Clinic Service*, U. CHI. L. SCH., <http://www.law.uchicago.edu/alumni/magazine/spring08/mikvaretires> (last visited Oct. 12, 2011) (noting that Mikva served as President William Clinton's White House Counsel from 1994–95).

477. *See Lawyers: Michael B. Mukasey*, DEBEVOISE & PLIMPTON LLP, <http://www.debevoise.com/michael-b-mukasey/> (last visited Sept. 16, 2011) (noting that Mukasey also served as U.S. Attorney General under President George W. Bush).

Osteen, William L., Sr.	
Parker, Robert M.	returned to practice ⁴⁷⁹
Pence, Martin	
Pickering, Charles W., Sr.	returned to practice ⁴⁸⁰
Pierce, Lawrence W.	
Pointer, Sam Clyde, Jr.	returned to practice ⁴⁸¹
Politan, Nicholas H.	returned to practice ⁴⁸²
Pratt, George C.	returned to practice ⁴⁸³
Riley, Paul E.	
Robertson, James	
Rosenbaum, James M.	
Roszkowski, Stanley J.	
Sarokin, H. Lee	
Smith, Fern M.	
Sporkin, Stanley	returned to practice ⁴⁸⁴
Sprouse, James M.	
Staker, Robert J.	
Taylor, Gary L.	
Tevrizian, Dickran M., Jr.	
Thompson, Ralph G.	
Thornburg, Lacy H.	
Wald, Patricia M.	
Weigel, Stanley A.	
Wilkins, William W.	returned to practice ⁴⁸⁵
Wolin, Alfred M.	returned to practice ⁴⁸⁶

478. *Lawyers & Advisors: William A. Norris*, AKIN GUMP STRAUSS HAUER & FELD LLP, <http://www.akingump.com/wnorris/> (last visited Sept. 16, 2011).

479. *Tyler Intellectual Property Attorneys: Attorney Profiles: Robert M. Parker*, PARKER, BUNT & AINSWORTH, P.C., <http://www.pbatyler.com/attorney-profiles/robert-m-parker/> (last visited Sept. 16, 2011).

480. See Charles W. Pickering, Sr. & Bradley S. Clanton, *A Proposal: Codification By Statute of the Judicial Confirmation Process*, 14 WM. & MARY BILL RTS. J. 807, 807 author footnote (2006) (listing Pickering's then-current affiliation with Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.).

481. *Attorneys: Sam C. Pointer Jr. (1934–2008)*, LIGHTFOOT FRANKLIN WHITE LLC, <http://www.lightfootlaw.com/alabama-lawyer/attorney.cfm?ID=32> (last visited Sept. 16, 2011).

482. Telephone Interview by Catholic University Law Review Staff with Office Staff, Nicholas H. Politan Law Office, Roseland, New Jersey (Sept. 16, 2011).

483. *George C. Pratt*, FARRELL FRITZ, P.C., <http://www.farrellfritz.com/index.php?pg=attorney-profile&aid=71> (last visited Oct. 1, 2011).

484. *Our People: Stanley Sporkin, Senior Counsel*, FREEH SPORKIN SULLIVAN, www.freehsporkinsullivan.com (last visited Sept. 16, 2011).

485. *Nexsen Pruet Attorneys: William W. Wilkins*, NEXSEN PRUET, <http://www.nexsenpruet.com/attorneys-290.html> (last visited Sept. 16, 2011).

Woods, George E.

Zampano, Robert C.

Ziegler, Donald E.

returned to practice⁴⁸⁷

486. *Alfred M. Wolin: Special Counsel*, SAIBER, http://www.saiber.com/attorney_profile.asp?id=56&/Alfred_Wolin (last visited Sept. 16, 2011).

487. *Cooper & Ziegler: Donald E. Ziegler*, COOPER & ZIEGLER DISP. RESOL., <http://www.cooperziegler.com/Dziegler.htm> (last visited Sept. 16, 2011).